In the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 27.

THE TENNESSEE ELECTRIC POWER COMPANY,
FRANKLIN POWER & LIGHT COMPANY,
MEMPHIS POWER & LIGHT COMPANY,
SOUTHERN TENNESSEE POWER COMPANY,
BIRMINGHAM ELECTRIC COMPANY,
MISSISSIPPI POWER COMPANY,
APPALACHIAN ELECTRIC POWER COMPANY,
CAROLINA POWER & LIGHT COMPANY,
ALABAMA POWER COMPANY,
KENTUCKY & WEST VIRGINIA POWER COMPANY, INC.,
KINGSPORT UTILITIES, INCORPORATED,
KENTUCKY-TENNESSEE LIGHT & POWER CO.,
WEST TENNESSEE POWER & LIGHT COMPANY,
MISSISSIPPI POWER & LIGHT COMPANY,
EAST TENNESSEE LIGHT & POWER COMPANY,
TENNESSEE EASTERN ELECTRIC COMPANY,
Plaintiffs-Appellants,

vs.

TENNESSEE VALLEY AUTHORITY, and
ARTHUR E. MORGAN, HARCOURT A. MORGAN and
DAVID E. LILIENTHAL, each individually and as an Executive Officer and Director of Tennessee Valley Authority,
Defendants-Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR APPELLANTS.

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ARGUMENT.

TABLE OF AUTHORITIES.

Cases.

Constitution.

Statutes.

Texts.

Miscellaneous.

FOR THE CONVENIENCE OF THE COURT, THE FOLLOWING SYMBOLS HAVE BEEN USED IN CONNECTION WITH EXHIBIT REFERENCES THROUGHOUT THIS BRIEF.

* Original exhibit reproduced by appellants or appellees in two separately bound volumes of maps and charts, nine copies of which have been supplied to the Court.

° Original exhibit, nine copies of which have been supplied to the Court.

÷ Original exhibit not reproduced or printed except when followed by a record reference, cited for the convenience of the Court, which indicates that the portion of the original exhibit referred to was also offered and excluded as an excerpt, and as such is printed in the record.

All other exhibits referred to in this brief are printed in the record, Volumes IV to VII.

TABLE OF ABBREVIATIONS USED IN REFERENCES.

Fdg.—Finding of Fact made by the trial court.

Add. Fdg.—Additional Finding of Fact made by Judge Gore.

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Defendants-Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR APPELLANTS.

This is a direct appeal from a final decree entered by the United States District Court for the Eastern District of Tennessee, after a hearing on the merits, dismissing a Bill brought by appellants to enjoin the appellees, Tennessee Valley Authority[1] and its directors, from generating, transmitting and distributing electricity for sale in competition with appellants upon the ground that the Tennessee Valley Authority Act[1] (Acts of Congress, May 18, 1933, and August 31, 1935, 48 Stat. 58, 49 Stat. 1075, 16 U. S. C. 831, *et seq.*), under color of which the appellees are proceeding, either does not authorize such acts or is to that extent unconstitutional.

[1] The Tennessee Valley Authority and the Tennessee Valley Authority Act are hereinafter sometimes referred to respectively as TVA and the TVA Act.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Tennessee is reported in 21 F. Supp. 947, and appears in the record at R. 542. An opinion by the United States Court of Appeals for the Sixth Circuit on an appeal from an order granting a preliminary injunction in this cause is reported in 90 F. (2d) 885 and appears in the record at R. 267. Three unreported opinions of the District Court overruling appellees' motion to quash service of subpoena and dismiss the bill of complaint, overruling appellees' motion to dismiss the bill for insufficiency and multifariousness, and granting appellants' application for a preliminary injunction, appear at R. 141, 158 and 260, respectively.

JURISDICTION.

A statement of the grounds on which jurisdiction of this Court is invoked has been separately filed in accordance with Paragraph 1 of Rule 12 of this Court. On May 16, 1938, this Court entered an order noting probable jurisdiction.

QUESTIONS PRESENTED.

The case presents the question of the constitutionality of the TVA Act in whole and in each of its several parts, or, if the Act be valid, then the validity of the administration thereof, in whole or in part, by those assuming to act thereunder in the particulars involved. The specific questions are:

1. Whether the electricity being generated and to be generated by TVA is being or will be constitutionally produced so that the Federal Government or its agency (TVA) acquires or will acquire any title to such electricity as incidentally produced.—

(a) in the exercise of the power of the Federal Government to regulate interstate commerce, or

(b) in the exercise of the war power.

2. Whether, assuming the electricity is being, and will be, constitutionally acquired by TVA under the TVA Act, the statutory and administrative methods of disposing of the property are an unconstitutional exercise of the power to dispose of property

(a) as in excess of the scope of that power, or

(b) in violation of the Fifth, Ninth and Tenth Amendments and contrary to our dual system of government.

3. Whether the appellants have a standing to sue to test the legality and constitutionality of the acts of the appellees done or threatened to be done either under the color or outside the terms of the TVA Act.

4. Whether, unless the appellants are entitled, on the record as made, to a reversal of the decree with directions to grant the relief prayed for, the appellants, nevertheless, are not entitled to a reversal of the decree because of prejudicial errors of the trial court in matters of procedure and in rulings on evidence amounting to a denial of due process of law to appellants.

STATUTE INVOLVED.

This suit involves the interpretation and constitutionality of the TVA Act, as amended. (Act of Congress of May 18, 1933; amended by the Act of Congress of August 31, 1935; 48 Stat. 58; 49 Stat. 1075; 16 U. S. C. 831, *et seq.*) The TVA Act and the material parts of other statutes, State and federal, cited in this brief or cited by the trial court as bearing on the case, are printed in the separate appendix to this brief.

STATEMENT OF THE CASE.

A. THE PARTIES AND THE PROCEEDINGS BELOW.

The appellants are sixteen corporations [1] respectively engaged in the business of supplying electricity to the public in the area in which TVA is supplying, offering to supply, or preparing and imminently threatening to supply, electric power to the public. (See pp. 61-64, *infra.*) The appellees are the Tennessee Valley Authority, a corporation created under the Act of Congress known as the TVA Act, and the three individuals who constitute its Board of Directors.

The suit was originally filed in the Chancery Court of Knox County, Tennessee, on May 29, 1936 (R. 1), and the case was thereafter duly removed at the instance of the appellees to the District Court of the United States for the Eastern District of Tennessee. The District Court on October 19, 1936, entered an order overruling a motion of the appellees to quash service of process and to dismiss the bill for want of jurisdiction. (R. 155.) On November 12, 1936, the District Court also entered an order overruling appellees' motion to dismiss the bill on the grounds that the bill stated no case or controversy and was multi-

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[1] Originally the Georgia Power Company, Tennessee Public Service Company and Holston River Electric Company were also parties complainant. The Georgia Power Company was subsequently enjoined from further participation in this suit upon the ground that a prior suit, involving the same issues, was still pending and undetermined in a Federal District Court in Georgia (*Georgia Power Co. v. Tennessee Valley Authority*, 17 F. Supp. 769, affirmed 89 F. (2d) 218, certiorari denied 302 U. S. 692); and said Company was subsequently dismissed without prejudice as a party to the instant suit. (R. 582.) Since this appeal was taken, Tennessee Public Service Company and Holston River Electric Company have turned over their electric facilities to TVA and its nominee, the City of Knoxville; and subsequently this Court entered an order permitting these companies to withdraw as parties to this suit and to this appeal without prejudice to the rights of the remaining appellants.

farious. (R. 159.) On December 22, 1936, the District Court entered an order granting the preliminary injunction which had been prayed for by appellants. On the same day the appellees took an appeal from the decree of preliminary injunction to the United States Circuit Court of Appeals for the Sixth Circuit, which, on May 14, 1937, rendered an opinion holding that the interlocutory injunction should be dissolved, that the Bill states a justiciable case or controversy, that the Bill is not multifarious, that the District Court has jurisdiction and that the case should be remanded for trial on the merits. (R. 267.) A decree was entered accordingly. (R. 285.) The appellees applied to this Court for a writ of certiorari to review this decree of the Court of Appeals on the ground that the Court of Appeals should have directed the dismissal of the Bill instead of remanding the case for trial on the merits. The application for certiorari was denied. (301 U. S. 710.)

Thereafter, and before the cause came on for trial, the Act of Congress of August 24, 1937, was passed, providing for a special three-judge court to hear and determine cases brought to enjoin, as unconstitutional, the execution of a federal statute. (50 Stat. 751, 752, Sec. 3; 28 U. S. C. 380a.) Pursuant to this statute a three-judge court was convened as the United States District Court for the Eastern District of Tennessee to hear the cause.[1] After a hearing on the merits, which was concluded on January 15, 1938, the three-judge court on January 25, 1938, entered the decree dismissing the Bill. (R. 573.) This appeal from that decree is taken directly to this Court under the Act of Congress of August 24, 1937. (50 Stat. 751, 752, Sec. 3; 28 U. S. C. 380a.)

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[1] Honorable Florence E. Allen, Circuit Judge, and Honorable John D. Martin, District Judge, were designated to participate with Honorable John J. Gore, District Judge, in hearing the cause. (R. 357.)

B. THE NATURE, PURPOSE AND SCOPE OF THE STATUTE AND THE CURRENT STAGE OF ITS EXECUTION.

(1) Background of the Tennessee Valley Authority Act.

An examination of the background upon which the TVA Act was passed shows that TVA is a federal corporation created by Congress to develop the power resources of the Tennessee River and its tributaries as a federal enterprise. In 1925, the Congress directed the Secretary of War, through the Corps of Engineers of the United States Army, and the Federal Power Commission to prepare and submit to Congress estimates of the cost of making surveys of the navigable streams of the United States and their tributaries with a view to formulating general plans for the most effective improvement of such streams for the federal purpose of navigation in combination with the most efficient development of the non-federal uses of such streams, such as water power, flood control and irrigation. (Act of Congress of March 3, 1925; 43 Stat. 1186, 1190, App. p. 35.) The manifest purpose of these surveys was to inform Congress as to the relative value of the streams for federal use, that is, navigation, and for non-federal uses, such as water power, irrigation and municipal water supply, so that Congress might exercise its paramount power over the streams for purposes of navigation in recognition of and with due regard for local non-federal uses, frequently more valuable.

In a report made pursuant to the Act of March 3, 1925, and published as House Document 308, 69th Congress, 1st Session (1926), the Corps of Engineers outlined a plan for surveys of practically all of the navigable streams of the United States and their tributaries (including the Tennessee River and its tributaries) to appraise the value of their federal and non-federal uses, and the surveys outlined in that document were authorized by the Act of Congress of January 21, 1927. (44 Stat. 1010, 1015.

App. p. 35.) All reports subsequently made under this authority are commonly known as "308 Reports."

The survey for the Tennessee River and its tributaries was transmitted to Congress on May 15, 1930, and published as House Document 328, 71st Congress, 2nd Session. (Comp. Ex. 105[2], p. 1.) This "308 Report," as required by the Act of Congress, examined both the federal and non-federal potential uses of the Tennessee River and its tributaries. The Chief of Engineers reported that the proper method of improving the Tennessee River for 9-foot navigation would be by the construction of 32 low-lift dams at a cost of $56,000,000 with locks 56 x 360 feet, or at a cost of approximately $75,000,000 with locks 110 x 600 feet. Such a channel with the larger locks would conform to the standards upon which the Mississippi River and its principal tributaries had been and were being improved for navigation. (Comp. Ex. 105[2], p. 4, par. 16; p. 97, par. 78; p. 100, par. 79; Add. Fdg. 3, R. 671.) *The improvement of the river for navigation alone would not have produced any commercial power but only sufficient power to operate the locks.* (Putnam R. 1155; Comp. Ex. 346*; Comp. Ex. 105[2], p. 100, par. 79, Add. Fdg. 19, R. 674.)

The Chief of Engineers pointed out that the District Engineer "as required by law" had shown "the ultimate use that may be made of the waters of the Tennessee Basin by the United States *and its citizens*," or, in other words, the sum of the values of the potential federal and non-federal uses of the river and its tributaries. (Comp. Ex. 105[2], p. 2, par. 8.) This ultimate use that might be made of the Tennessee River and its tributaries "by the United States *and its citizens*" included, as disclosed by the report, the ultimate development *by the citizens of the United States* of the river and its tributaries *for power* and the improvement of the river and some of its tributaries by the United States for navigation.

The report on the power resources, as distinguished from the navigation resources, of the Tennessee River and its tributaries showed that their maximum development would provide approximately 5,000,000 kilowatts of firm (i.e. dependable) capacity and would produce 25,000,000,000 kilowatt-hours of firm energy annually and that the cost of developing these power resources and providing in connection therewith the facilities necessary to provide or preserve 9-foot navigation[1] would be approximately $1,200,000,000. (Add. Fdg. 5, R. 672; Comp. Ex. 105°, p. 3, par. 10; p. 2, par. 8; p. 88, par. 67.)

The District Engineer regarded the cost of the low dams necessary to improve the river for navigation "as a measure of the benefits to navigation which are secured by the construction of the high dams and locks," (Comp. Ex. 105°, p. 5, par. 16) or, in other words, by the development of the power resources of the river with provision for the facilities necessary under such circumstances for navigation and without which navigation would be completely obstructed by the power development. The District Engineer then recommended "the adoption of the project for the improvement of the Tennessee River to Knoxville by low dams with locks of Ohio River standards * * * at an estimated cost of $74,709,000 * * *, provided that *under the provisions of the Federal water power Act* a high dam may be substituted for any two or more of the proposed low dams if the resulting cost to the United States will thereby be reduced *and the navigable capacity of the*

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[1] The development of the power resources involves the construction of high power dams; and, of course, unless navigation facilities such as locks, proper entrance channels and proper protection against currents produced by power operations were provided, these power projects would completely obstruct navigation on the river except such as might be carried on locally within each power pool.

waterway will not be lessened." (Comp. Ex. 105°, p. 5, par. 17.)

The controlling recommendation of the Chief of Engineers was:

> "that the adopted project by the United States for the improvement of the Tennessee River from its mouth to Knoxville be for a navigable depth of 9 feet at low water by low dams in the number and approximate location as set forth in the report of the district engineer: *Provided,* That under the provisions of the *Federal water power act* a high dam with locks may be substituted for any two or more of the low dams and *built by private interests, States, or municipalities: And provided further,* That in case high dams are built before the United States shall have built the projected locks and low dams which are to be replaced, the United States shall contribute to the cost of the substituted structures an amount equal to the estimated cost of the works of navigation for which substitution is made." (Comp. Ex. 105°, pp. 6-7, par. 23.)[1]

The Congress adopted the project for the improvement of navigation on the Tennessee River as thus recommended by the Chief of Engineers. (Act of Congress of July 3, 1930, 46 Stat. 918, 927-8, App. p. 36; Add. Fdg. 3, R. 671.) This is now, and at all times since, has been, the adopted Federal Navigation Project for the improvement of the Tennessee River. (Annual Report of Chief of Engineers, 1932, Part 1, Comp. Ex. 106†, pp. 1206-8, R. 2617; Annual Report of Chief of Engineers, 1936, Part 1, Comp. Ex. 107†, pp. 1032-4; R. 2619-20A.)

Private interests had acquired or were in the process of acquiring most of the sites for high power dams on the Tennessee River and many of its tributaries. (Add. Fdg. 5, R. 672; Barry R. 871; Kurtz R. 1231-2, 1217-8, 1228-9;

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[1] Unless otherwise noted, throughout this brief the emphasis has been supplied.

Watkins R. 1540-1, 1558.) However, because of the depression, the absence of a market for the power or the economic unsoundness of the construction of such high power dams on the Tennessee River, private interests, municipalities and States did not, prior to May, 1933, undertake the construction of any high power dams on the Tennessee River under the provisions of the Federal Water Power Act and the Act of Congress of July 3, 1930. (Add. Fdg. 5, R. 671.)

In this situation and on May 18, 1933, Congress passed the TVA Act which created a federal corporation to engage in the development of the power resources of the Tennessee River and its tributaries and the transmission and sale of such power just as those resources might have been developed by private power companies, municipalities or States under the terms of the Federal Water Power Act and the Act of Congress of July 3, 1930. As will hereafter more particularly appear, the Tennessee Valley Authority, a corporation, stands in the same relation to the Federal Navigation Project on the Tennessee River that private corporations, States and municipalities stand in cases where they make power developments on navigable streams under the Federal Water Power Act and where they would have stood if they had made these same power developments on the Tennessee River and its tributaries.

(2) The general purposes and pertinent features of the Tennessee Valley Authority Act.

(a) The relation, if any, of the TVA Act[1] to the improvement of navigation is at most incidental to power development. The TVA Act provides for the complete development of all of the power resources of the Tennessee River and its tributaries and merely acknowledges that

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[1] The TVA Act and the pertinent provisions of the Federal Power Act are printed in the Appendix to this brief.

such development must be in subordination to the paramount rights of navigation,—that is, the statute provides that TVA may develop all of the power resources of the Tennessee River and its tributaries upon exactly the same terms and conditions with reference to dominance of navigation that the Federal Power Act imposes upon a private company that undertakes to develop power resources on a navigable stream. (Barker R. 1992, 2016-7; Bowman R. 2249-51; Add. Fdg. 23, R. 675.) Thus, under the Federal Power Act the private licensee must "maintain the project works in a condition of repair adequate for the purposes of navigation" and "shall so maintain and operate said works as not to impair navigation." (16 U. S. C. 803(c).) A licensee under the Federal Power Act is required to construct, in connection with his power project, "structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War" (16 U. S. C. 804(a)); and the operation of such a licensed project "shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War." (16 U. S. C. 811.) Control of navigation facilities incidentally provided in connection with a power development *is vested in the War Department*, both under the Federal Power Act and under the TVA Act, and both the private licensee and TVA are obligated to supply without charge the power necessary for the operation of navigation facilities *as directed by the War Department*. (Federal Power Act, 16 U. S. C. 804(c), 811; TVA Act, Secs. 7(a), 5(k).) Like the Federal Power Act, the TVA Act is found in the Title of the Federal Code devoted to Conservation (Title 16) and not in the Title devoted to Navigation. (Title 33.)

(b) The TVA Act, in express terms, turns over the entire power resources of the Tennessee River and its tributaries[1] to a federal corporation for development as the basis for the creation of a great unitary federally-owned and operated electric power system. The power resources of the Tennessee River system, plus steam generating plants authorized to be constructed or acquired under the Act, are to constitute the generating facilities around which the ultimate electric system is to be constructed. Thus the Act provides:

1. That TVA may condemn lands for the construction of "dams, reservoirs, transmission lines, power houses and other structures * * * *at any point along the Tennessee River or any of its tributaries*" (Sec. 4 (i)), and that no one else may develop any power resources of the Tennessee River or its tributaries without the consent of TVA. (Sec. 26a.)
2. That TVA "shall have power to acquire or construct *power houses, power structures, transmission lines*, navigation projects and incidental works in the Tennessee River and its tributaries, and *to unite the various power installations into one or more systems by transmission lines.*" (Sec. 4 (j).)
3. That TVA "in the construction of any future *dam, steam plant, or other facility*, to be used *in whole or in part* for the *generation or transmission of electric power*," may issue or sell on the credit of the United States serial bonds not exceeding $50,000,000. (Sec. 15.)

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[1] The survey of the power resources of the Tennessee River and its tributaries made by the Army Engineers had disclosed to Congress that their maximum development would produce a firm or dependable capacity of 5,000,000 kilowatts and an annual output of 25,000,000,000 kilowatt-hours. (Comp. Ex. 105, pp. 3, 88, pars. 10, 67; Add. Fdg. 5, R. 672.)

4. That the Cove Creek (Norris) project, "together with a transmission line from Muscle Shoals" should be constructed "according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, *so that the maximum amount of primary power* may be developed at Dam Numbered 2 (Wilson) and *at any and all other dams* below the said Cove Creek Dam." (Sec. 17.)
5. That the President shall recommend legislation to accomplish, among other things, "*the maximum generation of electric power* consistent with flood control and navigation." (Sec. 23.)
6. That TVA may retain out of the proceeds of its power sales, such part as "in the opinion of the board shall be necessary for the Corporation * * * in conducting *its business in generating, transmitting and distributing electric energy*" (Sec. 26.)
7. That TVA shall in any event retain a continuing fund of $1,000,000 to defray emergency expenses and to insure continuous operation of the power business. (Sec. 26.)
8. That TVA may "produce, distribute, and sell electric power as herein particularly specified." (Sec. 5(1).)
9. That TVA may sell the power on long-term contracts ranging from 20 to 30 years. (Secs. 10, 12.)
10. That TVA may, out of funds appropriated by Congress, funds derived from the sale of power, or funds secured by the sale of bonds, "construct, lease, purchase, or authorize the construction of *transmission lines within transmission distance from the place where generated*,

and to interconnect with *other systems.*" (Sec. 12.)

11. That TVA may enter into contracts "*with other power systems*" for the exchange of power. (Sec. 12.)

12. That TVA shall have no control over the locks, i.e. the navigation facilities (Sec. 7(a)), and that upon requisition of the Secretary of War, TVA shall supply power without charge for use in operation of navigation facilities (Sec. 5(k)), as in the case of a private power development under the Federal Power Act.

The foregoing makes plain that under the statute the development of the power resources of the Tennessee River and its tributaries is not merely incidental to navigation improvement, but that the development of such power is at least an independent and separate, if not the paramount, objective of the statute. The TVA power project, like the power project of any private power company, need only be "consistent" with—that is, not unreasonably obstructive to—navigation and flood control, in so far as the latter comes within the field of federal power. Consistently with the statutory purpose to create a federal agency for power development, the TVA directors were forbidden to have a financial interest in a public utility corporation but were not forbidden to have a financial interest in a commercial barge line. (Sec. 2(f).)

(c) The statute affirmatively and in detail provides for the regulation of matters of intrastate concern, that is, the regulation of local electric rates, services and practices, and for the establishment of a policy of having the local electric business carried on by public bodies or nonprofit organizations. An examination of the Act discloses:

1. That the TVA in selling electricity "shall give preference to States, counties, municipalities and

cooperative organizations * * * *not organized or doing business for profit.*" (Sec. 10.)

2. That all contracts for sale of power to private companies or individuals, reselling such power for profit, shall contain a cancellation clause so that TVA may recapture the power for use in promoting the statutory policy of having the local electric business in the several States carried on by public bodies or non-profit organizations. (Sec. 10.)

3. That further to favor the policy of placing the local electric business in the hands of public bodies or non-profit organizations, TVA may enter into contracts for 30 years with such organizations, provided they will build transmission lines to TVA generating stations or transmission lines. (Sec. 12.)

4. That to forward such policy, TVA may extend credit for a period not exceeding five years to such public bodies and non-profit organizations situated within transmission distance from any TVA generating station to acquire and operate existing distribution facilities and incidental works, *including generating plants* and interconnecting transmission lines (Sec. 12a), and that for this purpose TVA is authorized to issue bonds in the amount of $50,000,000 upon the credit of the United States. (Sec. 15a.)

5. That TVA may "construct transmission lines to farms and small villages that are not otherwise supplied with electricity *at reasonable rates.*" (Sec. 10.)

6. That TVA may "make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable." (Sec. 10.)

7. That TVA may "include in any contract for the sale of power *such terms and conditions, including resale rate schedules,*" and "provide for such

rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act." (Sec. 10.)

8. That TVA may provide that any contract shall be voidable at its election in case the purchaser fails to comply with any terms, rules or regulations prescribed by TVA. (Sec. 10.)
9. That TVA "shall have power to acquire existing electric facilities used in serving such farms and small villages." (Sec. 10.)
10. That the power shall be sold at rates which will establish a policy in the several states of favoring domestic and rural use over industrial use. (Sec. 11.)
11. That the power shall be sold to domestic and rural consumers "at the lowest possible rates." (Sec. 11.)
12. That all contracts for sale of TVA power to public bodies or cooperative organizations "shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination." (Sec. 12.)
13. That TVA shall require in all contracts for sale of power to corporations or persons doing business for profit that such power shall be resold "*at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just and fair.*" (Sec. 12.)
14. That the statute provides for no hearing, appeal or review in connection with the fixing of any rates or other regulations of the local electric business.
15. That TVA shall fix its own rates (Sec. 14) and hence shall be free from State regulation.

The plain effect of the foregoing provisions is: that TVA may extend its electric business to any and all localities in the several States within transmission distance of its unitary grid system or power pool, without securing

any State or local franchise or complying with State law; that having taken over the public duty of supplying electric service to any or all localities in the various States within transmission distance of this power pool, it may discontinue such service without State approval or consent; and that the establishment within the States of these federal policies in relation to the local electric business is made certain and complete through the production and sale of an amount of electricity unlimited in relation to the available market (see pp. 65-69, *infra*) with numerous statutory subsidies provided at the expense of federal and State taxpayers so that privately owned and state-regulated utilities cannot compete. Many of the foregoing statutory provisions also are designed to promote the establishment, growth and expansion of the TVA power business.

(3) The steps taken and immediately threatened in the execution of the TVA Act and in the current TVA construction program known as the TVA Unified Plan.

Since its organization in 1933, TVA has been engaged in building the high dams essential for power production on the Tennessee River with incidental navigation facilities and in building high power dams and reservoirs on certain of its tributaries with no navigation facilities whatever. (Def. Ex. 153†, pp. 919, 970-977; Fdgs. 29-38, 40, 171, R. 600-4, 638; Add. Fdg. 18, R. 674.) *The TVA program of construction* of dams and hydro-electric plants on the Tennessee River and its tributaries has steadily and rapidly expanded from year to year since the organization of TVA until the present time when, *known as the TVA Unified Plan,* it includes seven high power dams and hydro-electric developments on the Tennessee River, designated as Gilbertsville, Pickwick Landing, Wheeler, Guntersville, Chickamauga, Watts Bar and Coulter Shoals, and

three high power dams and reservoirs on tributaries, designated as Norris on the Clinch River, Hiwassee on the Hiwassee River, and Fontana on the Little Tennessee River. (Comp. Ex. 328°, p. 20; Comp. Exs. 327*, 343*, 354*; see also Fdgs. 29-40, R. 600-4; Add. Fdgs. 8, 33, 107, R. 673, 677, 700.)[1] This is still the current construction program of the TVA as disclosed by the latest hearings before a committee of the Congress in December, 1937. (Def. Ex. 153†, pp. 948, 919.) The TVA Unified Plan also includes increasing the height of Wilson Dam (Comp. Ex. 328°, p. 25), which was built under the National Defense Act of June 3, 1916, (39 Stat. 166, 215), and completed in 1925.

The dams and hydro-electric projects already completed by TVA are Norris on the Clinch River and Wheeler on the Tennessee River. (Fdgs. 29, 30, 171, R. 600, 638.) The Pickwick Landing, Guntersville and Chickamauga projects on the Tennessee River and the Hiwassee project on the Hiwassee River are in process of construction. (Fdgs. 31-34, R. 601-2.) Schedules for the construction of the other projects have been reported to the Congress. (Comp. Ex. 328°, p. 27; Def. Ex. 153†, pp. 948, 977.) TVA has also requested funds to explore other tributaries for the purpose of discovering suitable sites and foundation conditions for the construction of additional hydro-electric developments on the tributaries. (Comp. Ex. 328°, p. 23; Comp. Ex. 108†, p. 25, R. 2621; Comp. Ex. 116†, p. 414; Kimball, R. 1852.)

The history of TVA activities shows that the present construction program of TVA is only a stage in the de-

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[1] The steady and rapid growth of the TVA construction program is vividly shown by the successive Congressional Hearings on TVA Appropriations (Comp. Exs. 108†, p. 23, R. 2621; 109†, pp. 137, 139-40, R. 2623-5; 112†, p. 287, R. 2680; 114†, p. 635, R. 2690; 115†, p. 279, R. 2696; 116†, p. 403, R. 2700A; Def. Ex. 153†, p. 948), the TVA Appropriation Acts (48 Stat. 274, 1055; 49 Stat. 596, 1607; 50 Stat 217) and the TVA Annual Reports since 1933. (Comp. Ex. 113°.)

velopment which TVA may be expected to continue to expand within the sweep of the statute until it substantially encompasses the development of the entire power resources of the Tennessee River and its tributaries. (See Comp. Ex. 105°, p. 3, par. 10; Add. Fdgs. 107, 112, R. 700-1.) Funds have been regularly provided by Congress on request of appellees as rapidly as the TVA construction program could be feasibly prosecuted. (48 Stat. 274, 1055; 49 Stat. 596, 1607; 50 Stat. 217; Comp. Exs. 108†, 109†, 112†, 114†, 115†, 116†, and Def. Ex. 153†.)

Moreover, TVA is not wholly dependent upon Congressional appropriations for the execution of its construction program, for it may utilize its power to issue bonds in the amount of $50,000,000 to build electric facilities of any kind (TVA Act, Sec. 15) and in the further amount of $50,000,000 to finance the acquisition of municipal and cooperative distribution lines to distribute TVA power (TVA Act, Sec. 15a), and it may utilize its income from its electric business, which it has reported to Congress will reach $23,000,000 a year (Comp. Ex. 115†, p. 279, R. 2697) even with the present TVA schedule of rates which are below subsidized cost. (See pp. 79-80, *infra*.) TVA has advised Congress that it is following the policy of financing its construction work through federal appropriations while holding its bonding power in reserve so that such bonding power, together with income from its power business, will be available for further extensions of its power plant and system when, as and if there should be any insufficiency of funds from the Congressional appropriations to carry out any enlargement or expansion of power facilities desired by TVA. (Dr. A. E. Morgan, Comp. Ex. 109†, pp. 138-9, R. 2624-5.) Thus TVA is becoming increasingly independent, and eventually will become wholly independent, of Congressional appropriations for financing any construction program which it desires to undertake.

All of the foregoing power dams, as well as Wilson Dam, are, or are to be, interconnected by heavy duty transmission lines so as to form a vast grid system or power pool. Thousands of miles of transmission lines will be necessary to distribute the power to be generated. (See pp. 69-70, *infra.*)

The plan provides for power generating machinery with an initial capacity of 697,000 kilowatts and an ultimate capacity of 1,922,000 kilowatts. (Add. Fdg. 7, R. 672; Def. Ex. 153†, p. 919.) For convenience and brevity, the capacity and energy output and the area of existing and threatened TVA power operations are described later in their appropriate relation to the issues in this suit. (See pp. 65-69, *infra.*) The foregoing is merely a brief description of the current construction program of TVA which is hereinafter sometimes referred to generally as the "TVA Unified Plan."

C. REVIEW OF THE FACTS RELATING TO THE CREATION OF THE WATER POWER.

(1) The creation of the water power by TVA is not incidental to the improvement of the Tennessee River for navigation but any improvement of the Tennessee River for navigation is incidental to the creation of water power.

This issue of fact is whether the water power will come into being as the incidental result of building structures which have a real, substantial and *bona fide* relation to the improvement of the Tennessee River for navigation, or whether the water power will come into being, wholly or in part, from the operation of structures deliberately designed and built to create water power.

On this issue of fact, as on others, the majority of the trial court failed or refused to make any findings on essential facts. Such findings as may be interpreted as

in any way apposite are bare conclusions which are not supported by findings of essential underlying facts (*Interstate Circuit v. United States,* 304 U. S. 55) or by the evidence. These conclusions are also based upon an erroneous conception of law as to the constitutional power of the Federal Government to acquire water power or electricity. Many evidentiary findings of the trial court are obviously based on the same erroneous conception of law and are consequently immaterial. Other evidentiary findings find no substantial support in the record, which establishes the contrary beyond dispute, and in some cases are squarely in conflict with the uncontradicted evidence.[1] The following are the essential facts on this issue as established by undisputed evidence or the clear weight of the evidence and in large part found by Judge Gore.

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[1] The general nature of these Findings and the manner in which they were adopted are described at pp. 91-92, *infra.* In relation to navigation, Fdgs. 47, 52, 53, 70, 74-76, 93, 94 are bare conclusions unsupported by findings of essential underlying facts or by evidence. Fdgs. 39, 42, 44, 46, 47, 52-54, 56, 57, 68-71, 73, 79, 93, 94 are based upon erroneous conceptions of law (pp. 103-104, 121-122, *infra.*) Fdgs. 39, 41, 42, 44, 46, 47, 52-5, 68-76, 79, 93, 94 are unsupported by and contrary to the clear weight of the evidence.

Thus Fdg. No. 41 (R. 604) states that the TVA dams are the same as those described in H. D. 328, 71st Cong. 2nd Sess. (Comp. Ex. 105) which "were designed primarily for navigation and flood control." An examination of that report shows that in so far as the TVA dams correspond in location with, or resemble, any dams discussed in that report, they correspond with and resemble the dams which were there described as essential to a vast scheme for the maximum development of the power resources of the Tennessee River and its tributaries by private interests, States or municipalities at an estimated ultimate cost of $1,200,000,000. They were described in that report only in obedience to the Congressional mandate that "308 Reports" should advise the Congress as to *all* the beneficial uses of the water resources of navigable streams, both federal and non-federal. (See pp. 6-9, *supra.*) The extent to which the foregoing findings are erroneous is set forth in Assignments of Error 68-71, 73, 75, 79. (R. 736-740.)

A comparison of the existing project for the improvement of navigation on the Tennessee River, adopted by the Act of July 3, 1930 (herein referred to as the Federal Navigation Project), for the Tennessee River and the TVA Unified Plan from the standpoint of the physical structures, capacity to carry commerce, integration with our great inland waterway system, power development, cost or economic justification, order of construction and expedition, navigation benefits and all the material characteristics of a Rivers and Harbors project conclusively establish that the TVA Unified Plan is a power project and not a navigation project which incidentally produces some power.[1]

Physical Aspects of Channels. The Federal Navigation Project provided for the creation of a 9-foot channel from Knoxville at the head of the river to its mouth by the construction of some 32 low navigation dams with locks 110 x 600 feet. (Comp. Ex. 105°, pp. 4, 6, pars. 16, 23; Putnam R. 1152-3.) The navigation pools behind these dams would be confined within the natural banks of the stream. This is of great importance in protecting inland water navigation against the hazards of winds and waves. (Putnam [2] R. 1158-9, 1187; Add. Fdg. 37, R. 678.) The lift

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[1] The purpose of examining the nature of the structures and the characteristics of the project embodied in the TVA Unified Plan is not to ascertain whether a better or more economical navigation project could have been designed, as the trial court surprisingly suggests in its opinion (R. 561), but to ascertain whether the project in the TVA Unified Plan is a navigation project, or a power project. or two separate projects combined in a single scheme, or whether the structures which create the power have any real, substantial or *bona fide* relation to the improvement of navigation.

[2] Major R. W. Putnam, officer of the Corps of Engineers from his graduation from West Point in 1913 until his resignation in 1926, during which period he held, among other positions, that of United States District Engineer for the Chicago District. Since 1926 he has had a wide practice as a consulting engineer on river and harbor work and has also been actively engaged in the commercial navigation business on inland waterways. (R. 1148-51.)

of these locks and dams averages 11.3 feet and their cost averages $2,330,000. (Comp. Ex. 105 B, R. 2616B.) These dams would be of a movable wicket type having navigable passes which would make possible open river navigation for substantial portions of the year. (Add. Fdg. 30, R. 677; Putnam R. 1154.) Under the standard practice of the Corps of Engineers the channel at controlling points would be dredged to an overdepth of three feet so that controlling depths would be twelve feet.[1] (Add. Fdg. 4, R. 671; Putnam R. 1174; Watkins R. 1604-5; Barker R. 2009.) All of the structures in the Federal Navigation Project are appropriate and necessary for navigation. Practically no land lying outside the natural banks would be flooded by the navigation pools.

The structures included in the TVA Unified Plan are very different, and, apart from incidental navigation facilities without which navigation would be completely barred, are neither essential nor useful for navigation. These structures consist of seven high power dams on the Tennessee River and three high power dams on certain tributaries. (See pp. 17-18, *supra*.) The two dams on the Tennessee River below Wilson Dam and Dam No. 1 are being, or are to be, provided with locks 110 x 600 feet; but the five dams on the Tennessee River above Wilson Dam[2] are being, or are to be, provided with locks only 60 x 360 feet. (Fdg. 43, R. 607; Putnam R. 1158.) The maximum lift at the seven dams on the Tennessee River ranges from 45 to 71

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[1] It is the depth at critical or controlling points, commonly known as "controlling depths," which determines the over-all capacity and usability of an inland waterway.

[2] Both the navigation channel provided by the Federal Navigation Project and the navigation channel which will be incidentally provided in connection with the power project embodied in the TVA Unified Plan utilize Wilson Dam and Dam No. 1, both of which had been previously built by the Federal Government, and Hales Bar Dam which had been previously built by a predecessor of The Tennessee Electric Power Company.

feet with an average of 60 feet and an average normal lift of 55 feet, and the cost of these dams will range from $30,000,000 to $112,000,000 each. (Comp. Ex. 116†, p. 403, R. 2700A; Def. Ex. 153†, p. 919; Putnam R. 1156; Add. Fdg. 33, R. 677.) These dams will have no navigable passes (which are impossible in a high power dam) so that craft would have to lock through at all seasons of the year.

The navigation channel in the Tennessee River which will be incidentally provided in connection with the power project embodied in the TVA Unified Plan will be what is known as a 9-foot channel with over-depths at controlling points of only two feet, and consequently with a controlling depth of only eleven feet. (Bowman R. 2234, 2237; Barker R. 1951.) These high dams will create a series of great artificial lakes, which, as hereinafter pointed out, are dangerous and undesirable for the type of craft which use our inland waterway system. These lakes will extend far beyond the natural banks of the river, will have widths as great as six miles (Fdg. 77, R. 618; Def. Ex. 60*), and will permanently flood 415,700 acres of rich valley land. (Def. Ex. 153†, p. 919.)

Tributary Dams. The Federal Navigation Project includes no tributary dams or reservoirs. The TVA Unified Plan includes three high power dams and reservoirs on three of the tributaries. These dams range in height from 265 to 450 feet. (Comp. Ex. 328°, pp. 25, 95, 100, 104; Def. Ex. 153†, pp. 972, 974; Def. Ex. 49*.) None of them has or will have any navigation facilities. Norris, Hiwassee and Fontana would be obstructions to any possible navigation on the tributaries. (Add. Fdgs. 18, 34, R. 674, 677; Putnam R. 1168.) None of these tributary dams will be of any value to navigation on the Tennessee River on completion of the TVA Unified Plan. (Add. Fdgs. 16, 18, R. 674; Putnam R. 1168-9, 1187-8, Offer to Prove, R. 2309, 2334;

Kelly[1] R. 1375.) The appellees attempted to prove that it would be possible to have through traffic on the Clinch River by means of a coal conveyor to carry coal over Norris Dam from barges above the dam to barges in the river below; but upon their own evidence the trial court found that this would not be practicable or feasible. (Fdg. 80, R. 619; Watkins R. 1622-3; Barker R. 1956-7, 1995-8; Comp. Ex. 933*.) This was apart from the fact that it also appeared that the Clinch River is not practicably navigable in any event. (Barker R. 1998; Comp. Ex. 365†, p. 302.)

The appellees below advanced the fanciful contention that these tributary reservoirs are navigation developments because the release of the stored water during the low water season for the generation of power at the tributary plants and at the main river power plants downstream will incidentally enrich the low water flow of the Tennessee River. *The construction of the Federal Navigation Project or the main river dams of the TVA Unified Plan will result in slack water navigation on the Tennessee River from its mouth to its head at Knoxville.* (Add. Fdg. 16, R. 674; Putnam R. 1155, 1167-9; Kelly R. 1375; Comp. Exs. 105A, 105B, R. 2616A, B; Comp. Ex. 342*.) And the only possible method of improving the Tennessee River for 9-foot navigation is by canalization or slack water navigation. (Barker R. 1943; see also Comp. Ex. 105°, p. 33.) *It is uncontradicted that with slack water navigation the ex-*

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[1] Colonel Wm. Kelly, President of the Buffalo, Niagara & Eastern Power Corporation; officer in the Corps of Engineers from the time of his graduation from West Point in 1899 until his resignation in 1928, serving as Assistant to the Chief of Engineers, a member of several Commissions studying flood control on the Mississippi River, Chairman of the Board formed to study Mississippi flood control immediately after the great flood of 1927, member of the Board studying the St. Lawrence Waterway, and Chief Engineer for the Federal Power Commission for five years. (R. 1362-6.)

treme low water flow of the Tennessee River is far more than sufficient to supply all of the needs of navigation. Any additional flow will either have no effect or its effect, if any, will be unfavorable to navigation. (Add. Fdg. 16, R. 674; Putnam R. 1155, 1167-9, 1188, Offer to Prove, R. 2309-10, 2333-4; Kelly R. 1375; Woodward R. 1796-7.) It is also clear that there is no benefit to navigation from enrichment of low water flow in the Mississippi River (Putnam R. 1168, Offer to Prove, R. 2309-10, 2331, 2333-4; Knappen, Offer to Prove, R. 2355-6); and moreover TVA is not charged with any duty or granted any authority in relation to navigation on the Mississippi River under the TVA Act.

Integration with Mississippi Inland Waterway System. The Federal Navigation Project provides a waterway fully integrated with, and in every way adapted to incorporation in, the great inland waterway system of the Mississippi River and its principal tributaries, which system is uniformly based on a 9-foot channel (with usual over-depths at controlling points) and standard locks 110 x 600 feet. (Add. Fdg. 3, R. 671; Putnam R. 1169; Barker R. 2009; Comp. Ex. 105°, p. 100, par. 79.) The navigation facilities which will be incidentally provided in connection with the power project embodied in the TVA Unified Plan are not integrated with that system because their controlling depths are a foot less, because five of its seven locks are scarcely more than half standard size for the Mississippi system and because the wide waters in the lakes created by the TVA power dams require a different type of transportation equipment than that commonly used on the Ohio and Mississippi Rivers. (Add. Fdg. 22, R. 675; Putnam R. 1169, Offer to Prove, R. 2304-6; Willson R. 1393.)

Capacity for Carrying Commerce. The capacity of the Federal Navigation Project is substantially greater than that of the navigation facilities which would be incidentally provided in connection with the power project

embodied in the TVA Unified Plan (Add. Fdgs. 26-29, 35, R. 675-7; Putnam R. 1153-4, 1157-8), even with no allowance for the fact that during a substantial and important part of the year (which would be as great as 67 per cent of the time in the lower river) there would be open river navigation and, therefore, practically unlimited capacity in the Federal Navigation Project. (Add. Fdg. 30, R. 677; Putnam R. 1154; Barker R. 2004.)

Power Production. The Federal Navigation Project would produce no power except a small amount for the operation of navigation facilities. It would produce no commercial power. (Add. Fdg. 19, R. 674; Putnam R. 1155-6, 1166; Comp. Ex. 105°, p. 100, par. 79; Comp. Ex. 346°.)

On the other hand, the structures in the TVA Unified Plan are precisely the kind of structures which would be built by a private power company for the purpose of developing the maximum amount of power. (Add. Fdg. 75, R. 685; Crane R. 1283-4; Kurtz R. 1218; Bowman R. 1744, 1765.) The maximum development of the power resources of a given stream would be achieved by building a single dam at its mouth high enough to concentrate at that point the entire fall of the stream. Since that is not ordinarily practicable, the greatest practicable development of the power resources of a stream is achieved by developing the entire fall of the stream by the smallest number of high dams that it is practicable to construct. The TVA Unified Plan provides for the construction of the smallest number of high dams with which it is practicable to develop the entire fall of the Tennessee River (Add. Fdg. 76, R. 685; Bowman R. 1764-5), and in addition provides a vast amount of power storage on the tributaries which greatly increases the firm capacity of the system.

In an extreme low water year the TVA Unified Plan will have (over and above the capacity of Wilson Dam before it was incorporated in the TVA power system) 632,000

kilowatts of firm (i.e. dependable) capacity at 100% load factor or 1,072,000 kilowatts of firm capacity at 60% load factor, which is a representative load factor for a large utility in the area in which TVA is carrying on its power business. (Add. Fdgs. 11, 12, 19, R. 673-4; Putnam R. 1158, 1166; Kurtz R. 1211-12, 1215; Comp. Ex. 346*.) It will create a vast quantity of firm and secondary power. (See pp. 66-69, *infra.*) *It is an undisputed fact that five-sixths of this vast quantity of firm power will be created by the three tributary dams and reservoirs.* (Add. Fdg. 11, R. 673; Kurtz[1] R. 1215.) These tributary dams, as before pointed out, are obstructions to any conceivable navigation on the tributaries and of no benefit to navigation on the Tennessee River. (See pp. 24-26, *supra.*)

Comparative Costs. The cost of the Federal Navigation Project would be less than $75,000,000. (Add. Fdg. 31, R. 677; Putnam R. 1155; Barker R. 1993; Comp. Ex. 105°, pp. 7, 100.) If constructed with smaller locks comparable in size to the locks built or to be built at all except two of the TVA power dams on the Tennessee River, the Federal Navigation Project could have been built for about $56,000,000. (Comp. Ex. 105°, p. 4, par. 16.) The TVA Unified Plan will cost approximately $473,000,000, exclusive of Wilson Dam (Add. Fdg. 31, R. 677; Putnam R. 1158; Comp. Ex. 116†, p. 403, R. 2700A; Def. Ex. 153†, p. 919), or approximately $400,000,000 more than the Federal Navigation Project. (Putnam R. 1161; Comp. Ex. 346*.)

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[1] Ford Kurtz, Chief Hydraulic Engineer, J. G. White Engineering Corporation, for 28 years hydraulic engineer for this Company and intimately connected with the design and construction of some of the largest hydro-electric projects in this country and abroad; acted as consultant on a large number of other projects such as a complete and extensive investigation of the Los Angeles Aqueduct, a $220,000,000 project, flood control dams of Muskingum flood control system, Fort Peck for U. S. Engr. Corps, and storage of flood waters of the Blue Nile in Lake Tsana for the Egyptian, Sudanese and Ethiopian Governments. (R. 1189-1193.)

Moreover, the cost of constructing the TVA Unified Plan exceeds the investment which may be justified for the benefit of navigation by $425,650,000. (Add. Fdg. 43, R. 678; Putnam 1164, 1166; Comp. Ex. 346*.) Indeed, even the cost of the Federal Navigation Project exceeds the justifiable expenditure for navigation by $39,400,000, but under the standard practice of the Corps of Engineers in such cases that project would have been constructed gradually as economic justification developed. (Add. Fdgs. 17, 41, 43, R. 674, 678; Putnam R. 1164, 1166; Comp. Ex. 346*; Kelly R. 1375; Comp. Ex. 105°, p. 7.) This grossly disproportionate expenditure under the TVA Unified Plan is not for the benefit of navigation but for some other purpose. (Add. Fdgs. 15, 21, R. 674-5; Putnam R. 1169, 1185; Kelly R. 1375.) That purpose is the deliberate and independent construction of a power project. (Kurtz R. 1218-19; Crane[1] R. 1283-4.)

Order of Construction and Delay in Providing a Continuous Nine-Foot Channel. The Federal Navigation Project could have been entirely completed between the date of the adoption of the TVA Act and the time of trial at a cost approximately equal to the sum spent by TVA on Wheeler and Norris Dams and power plants so that navigation would now have, and for a considerable time past would have had, the benefit of a continuous navigable channel over the 652 mile length of the Tennessee River fully in-

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[1] Albert S. Crane, Consulting Engineer, for 39 years engaged in the design and construction of dams and hydro-electric plants and for 15 years Vice President in charge of engineering and construction for J. G. White Engineering Corporation; designed over 38 dams and hydro-electric plants and acted as consultant on between 20 and 30 other large dams; at present consulting engineer on the Mahookey Flood Control Project in New York State and on the Board of Consulting Engineers on Southern New York Flood Control District. (R. 1280-2.)

tegrated with the 9-foot channel in the Ohio and Mississippi Rivers and certain of their important tributaries. (Add. Fdg. 24, R. 675; Woodward R. 1796; Barker R. 1993.) At the time of the trial after almost five years of construction activity and after the expenditure of nearly $200,000,000, TVA had added only 74 miles of 9-foot channel on the Tennessee River. (Fdgs. 40, 77, R. 603, 618.)

The Tennessee River, as above indicated, connects with a 9-foot inland waterway in the Ohio and Mississippi Rivers and certain of their more important tributaries. The two most important centers of industry and commerce in the Tennessee Valley are Knoxville and Chattanooga. In five years TVA has failed to improve the lower 184 miles of the Tennessee River so as to afford an adequate connection with the 9-foot channel in the great inland waterway system of the Mississippi Valley and has likewise failed to provide any practicable navigable channel whatsoever between the two most important commercial and industrial centers in the Tennessee Valley. (Barker R. 1988-90.)

TVA, on the contrary, undertook first the construction of Norris and Wheeler Dams, both of which were the most important from the standpoint of power development, not only by reason of the power developed at those sites, but also by reason of increasing the firm power capacity of Wilson Dam. (Kelly R. 1375; Woodward R. 1815, 1798; Comp. Ex. 909*; Bowman R. 2251.) The operation of Norris Dam also permits the manipulation of the pools of the main river dams for power purposes and daily peaking to meet the utility load curve. (Add. Fdg. 25, R. 675; Barker R. 1994.) TVA next undertook the construction of the Pickwick Landing project below Wilson Dam, which not only provided additional power at its site, but also increased the firm power capacity of Wilson Dam by enabling TVA to escape the restrictions placed by the Army Engineers upon peaking for power purposes at Wilson Dam.

(Bowman R. 1744-5, 1747, 2251; Woodward R. 1813.) Norris and Hiwassee (now under construction) will also increase the firm power capacity of other main stream dams when and if they are constructed.

The sites of the TVA dams are those which would be developed if the primary purpose were to produce as quickly as possible a vast amount of firm power for utility use (Kurtz R. 1218; Crane R. 1283-4; Bowman R. 1744), and the incidental provision of a continuous 9-foot navigation channel has been, and is being, postponed to meet the demands of that power program. Indeed, there is evidence in the record that TVA may not provide the 9-foot channel throughout more than one-fourth of the length of the river *within a period of eight or ten years.* (Barker R. 1993.) Yet generating equipment has already been scheduled for installation *within the next three years,* sufficient to serve a utility load of 570,000 kilowatts. (Def. Exs. 140, 141, R. 4187, 4188.)

Claimed Advantages of TVA Navigation Facilities are Non-existent or Negligible and are More than Offset by Disadvantages. The facts reviewed show that *in all of the substantial and important characteristics of an inland waterway,* the Federal Navigation Project is definitely superior to the navigation facilities which will be incidentally provided in connection with the power project of the TVA Unified Plan. The appellees have claimed trifling advantages for the incidental TVA navigation facilities in negligible and inconsequential respects, but a review of the evidence shows no measurable advantage *even in these negligible matters.* (Putnam R. 1158-61; Kelly R. 1374; Add. Fdg. 40, R. 678.)

Thus the reduction in the number of lockages arising from the construction of the smaller number of high dams is offset by locks of higher lift (Putnam R. 1158-9, 2325-6;

Comp. Exs. 932, 935; Barker R. 2000-3), by the necessity of breaking up of standard Ohio River tows at the smaller TVA locks above Wilson (Putnam R. 1158, 1172; Barker R. 2003-4; Watkins R. 1601-2)[1] and by the fact that for a substantial and important period of the year there will be open river navigation and, therefore, practically unlimited capacity under the Federal Navigation Project, just as is the case with the federal navigation project on the Ohio River. (Add. Fdgs. 30, 35, R. 677; Putnam R. 1154, 1159; Barker R. 2004, 2013.)

The appellees claimed that smaller fluctuations of stage in the pools in the TVA Unified Plan will benefit terminal facilities, but there is no difference in pool fluctuations under the Federal Navigation Project and under the TVA Unified Plan at the four principal terminal sites upon the Tennessee River,—that is, Florence, Sheffield, Chattanooga and Knoxville (Add. Fdg. 20, R. 675; Putnam R. 2298, 2330, Offer to Prove, R. 2332-3; Barker R. 2010-11; Watkins R. 1609-11), and the fluctuations that exist at these points are inconsequential. (Putnam R. 2330.) The TVA Unified Plan will destroy one of the most modern existing terminals on the river at Danville, Tennessee. (Watkins R. 1611-12; Putnam R. 1167.) There is no record of federal expenditure to avoid natural fluctuations of stage for the benefit of terminals on the Ohio, Monongahela, or any other important inland waterway. (Barker R. 2020.) Fluctuations in stage on the Ohio River very greatly exceed those on the Tennessee River. (Watkins R. 1612.)

The suggestion that the TVA high power dams benefit navigation by backing water up into the mouths of tributaries is plainly without substance. Not only did the Chief of Engineers fail to recommend the improvement of

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[1] The small TVA locks above Wilson also necessitate the breaking up of the only important tows (railroad car ferry at Guntersville, Ala.), which are presently and for many years have been using the Tennessee River. (R. 1953.)

any tributary of the Tennessee River (Comp. Ex. 105°, pp. 1-7; Barker R. 1986-7), but the backing up of the water into the mouths of tributary streams creates no navigable channel reaching any potential commerce (Barker R. 1983-4, 2005-6; R. 2008) and is in fact merely the incidental result of the construction of the high power dams on the main stream. (Barker R. 2007.) Indeed, the only substantial effect is to flood some valuable farm lands. (Offer to Prove, R. 1244-50.)

Appellees' claim that the greater depths of the large TVA lakes will benefit navigation by making greater speeds possible is insubstantial (Putnam, Offer to Prove, R. 2329), if not wholly unfounded. The depths which would be provided by the Federal Navigation Project are wholly adequate and conform to the development of the remainder of the Mississippi River system. (Add. Fdg. 3, R. 671; Putnam R. 1169; Comp. Ex. 105°, pp. 100, 5, 6, pars. 79, 17, 23.) Depths greater than necessary to eliminate bottom friction are of no value to navigation and excessive depths are hazards to navigation in that they make it difficult to ground boats immediately in case of accident and increase the difficulty and expense of salvage operations when boats founder. (Add. Fdg. 36, R. 678; Putnam R. 1160, Offer to Prove, R. 2329-30.) The large lakes impounded behind the TVA dams have sufficient depth and width to permit the creation of waves of 3 feet or more in height. (Add. Fdg. 38, R. 678; Putnam R. 2304, Willson R. 1392.) Any theoretical advantage in increased speed of tows is not only practically negligible, but is far more than offset by the increased hazard to the equipment having limited freeboard, which is used in inland water transportation, from wind and waves upon the large TVA lakes (Putnam R. 1158-61, 1187, 2304, Offer to Prove, R. 2329; Willson R. 1392-3, 1395; Add. Fdg. 37, R. 678) and the much more serious consequences of the inevitable oc-

casional accidents in such deep water.[1] (Putnam R. 1160, Offer to Prove, R. 2329-30.)

Of like character is the appellees' claim that lower current velocities will prevail at the heads of the large TVA lakes than would occur at the heads of the small pools behind the low navigation dams of the Federal Navigation Project. There is no proof that the current velocities under the Federal Navigation Project would be a material consideration (Putnam, Offers to Prove, R. 2309, 2327-9) or that they would be greater than those prevailing on more important inland waterways where the Congress has never dreamed of spending hundreds of million of dollars to transform the rivers into vast artificial lakes.

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[1] The appellees advanced the claim that the Corps of Engineers is substituting "high" dams for "low" dams on navigation projects. This, however, is a mere play on words. In fact, the Engineers Corps is merely replacing certain antiquated navigation dams by new dams which are "high" dams only in the sense that their height is slightly greater than that of the antiquated dams which they are replacing. None of these modern navigation dams remotely approaches in height any of the dams in the TVA Unified Plan. In fact, the appellees were unable to cite any instances where the new dams are high enough to extend the river beyond its natural banks (Watkins R. 1618); and this would be contrary to the practice of the Corps of Engineers (Putnam R. 1187, 2337.)

Appellees also advanced the contention that the Corps of Engineers is no longer constructing wicket dams (that is, dams with navigable passes), although they were unable to offer any proof that the Corps of Engineers had adopted such a policy. As a matter of fact the Corps of Engineers has currently recommended the construction of wicket dams on the Ohio River (Putnam R. 2310-12; Comp. Ex. 936†, excluded, pp. 1, 2, 14, 157) and is presently constructing dams of this type at La Grange and Peoria on the Illinois River (Annual Report of the Chief of Engineers for the fiscal year ending June 30, 1937, Vol. I, p. 974.) Of course, the determination of whether a navigation dam shall be a fixed dam or shall have a navigable pass is solely a question of judgment as to which will be the more beneficial to navigation on the stream and has nothing to do with the height of the dam.

Over-all Comparison: The structures in the TVA Unified Plan are not primarily designed to improve navigation on the Tennessee River. (Add. Fdg. 21, R. 675; Putnam R. 1169.) They are precisely the kind of structures which would be built by a private power company for the purpose of developing rapidly the maximum amount of power. (Add. Fdg. 75, R. 685; Crane R. 1283-4; Kurtz R. 1218; Bowman R. 1744, 1765.) The navigation facilities incidentally provided in connection with the power project embodied in the TVA Unified Plan are over-all inferior to the Federal Navigation Project. The vast additional expenditure provides no additional navigable capacity or navigation advantages. The explanation of the huge additional expenditure cannot be found in navigation (Add. Fdg. 15, R. 674; Putnam R. 1161, 1169; Kelly R. 1375; Comp. Ex. 105°, pp. 4-5; Comp. Exs. 105A, 105B, R. 2616A, B; Comp. Ex. 346*) but is plainly attributable to power development. (Crane R. 1284; Kurtz R. 1218-19.)

The situation was accurately summarized by *General George B. Pillsbury, then Assistant Chief of Engineers,* in his testimony given before the House Committee on Military Affairs (Comp. Ex. 365†, pp. 301-2) on proposed amendments to the TVA Act, as follows:

> "General Pillsbury: Congress authorized, in the Rivers and Harbors Act of 1930, the construction of locks and dams on the Tennessee River at an estimated cost of $75,000,000 or $70,000,000—I think $75,000,000—to provide 9-foot barge navigation to Knoxville, at the head of the river.
>
> The estimates were based on low navigation dams, but the Act, in accordance with the recommendation of the Chief of Engineers, provided that if high dams were built by the States, municipalities, or private corporations under licenses from the Federal Power Commission, as then provided by law, that the cost of the low dams would be contributed to the cost of the high dams which would replace them.

> The Tennessee Valley Authority is constructing high dams in certain localities. * * * They invariably consulted us *on all matters relating to navigation.*
>
> Mr. McLean: Have they embarked on a program of high dams instead of the low dams?
>
> General Pillsbury: Yes. *The low dams have no power value whatever.*
>
> Mr. McLean: *So that the high dams would be constructed with the idea of electrical power generation only in view?*
>
> General Pillsbury: *Oh, yes.* The high dams are very much more costly than the low ones. *They are not better for navigation,*[1] *but the justification for their large expenditure can be found only in the power that they make available.*"

A review of the evidence leaves no doubt that the water power is not coming into being and is not to come into being, as the incidental result of structures built or to be built for the improvement of the Tennessee River for navigation.

(2) The creation of none of the water power is incidental to the operation of structures built for protection against flood damages to navigation.

Flood damages to navigation on the Tennessee River are negligible in character and amount and would not be reduced by the TVA Unified Plan in an amount sufficient

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[1] The court in its opinion states that the main stream dams "are essential to the *maintenance* of 9-foot navigation." (R. 550.) In fact these high dams were essential and desirable only for power development, and they are related to the maintenance of 9-foot navigation only in the sense that, if and when they are built, they will submerge, and make impossible the use of, any navigation facilities other than those incidentally resulting from power development so long as they remain.

to justify any capital expenditure. (Putnam R. 1167; Add. Fdg. 44, R. 679.)[1]

The completion of the TVA Unified Plan would not eliminate any measurable amount of flood damages to navigation on the Mississippi River (Kelly R. 1374, 1368); and moreover TVA is not granted any power or charged with any duty under the TVA Act with respect to navigation on the Mississippi River. (Add. Fdg. 45, R. 679.) No part of the cost of the TVA Unified Plan may properly be charged to protection against, or elimination of, flood damages to navigation on the Tennessee or Mississippi Rivers. (Kelly R. 1374; Putnam R. 1167.)

(3) None of the TVA commercial water power is created as the incidental result of the operation of any flood control structures; and such flood control structures as are included in the TVA Unified Plan are a minor, if not a pretensive, part and purpose of that Plan.

On this issue also the majority of the trial court failed or refused to make any findings on essential facts, that is, whether, and if so to what extent, any of the water power is or will be created by the operation of structures built for flood control. Their conclusory findings, to the extent, if at all, that they may be apposite, are not only unsupported by evidentiary findings and by the record but are against the clear weight of the evidence. Their conclusory findings and many of their evidentiary findings are based upon an erroneous conception of law as to the constitutional power of the Federal Government to acquire water

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[1] In so far as Fdg. 59 (R. 612) states or implies that flood damages to navigation are not inconsequential and that they would be appreciably reduced by the TVA Unified Plan, it is a bare conclusion, not supported by findings of essential underlying facts or by the evidence. It was rejected by Judge Gore. (R. 669.)

power or electricity and as to the nature and scope of any federal power over flood control.[1]

TRIBUTARY PROJECTS. (a) *None of the commercial water power created by the tributary projects is created by the operation of flood control structures.* A review of the evidence shows that the tributary projects severally consist of a large power reservoir upon which is superimposed a small flood control reservoir and that such flood control reservoirs do not and can not produce any commercial power. The tributary projects consist of the Norris project on the Clinch River, the Hiwassee project on the Hiwassee River and the Fontana project on the Little Tennessee River. The Norris project is a typical tributary project and it is sufficient, therefore, to review the evidence bearing upon the structural and functional characteristics of this project.

The Norris Dam is 214 feet high from the bottom of the river to the top of its gates, elevation 1034. (Comp. Ex. 328°, pp. 91, 92; Comp. Ex. 362*; Def. Ex. 50*, 51; Wessenauer R. 2190.) The lower 135 feet, or up to elevation 955, is built and utilized to create *dead storage* by impounding water above the dam so as to concentrate the fall of the river and thus make possible the production of commercial power. The purpose and function of this dead storage at Norris is to make possible the production of electric power. (Kurtz R. 1210, 1213; Comp. Ex. 362*; Wessenauer R. 2189-90; Add. Fdg. 70, R. 684; Creager, Offer to Prove,

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[1] Fdgs. 39, 47, 60, 62, 63, 65, 68, 69, 74-6, 93, 94 are bare conclusions unsupported by findings of essential underlying facts or by evidence. Fdgs. 39, 41-7, 60-69, 74-6, 79, 93, 94 are unsupported by and contrary to the clear weight of the evidence. Fdgs. 39, 42, 44, 46, 47, 58-60, 65, 68, 69, 73, 74, 79, 93, 94 are based upon an erroneous conception of law. (See p. 128, *infra*.) The extent to which the foregoing findings are erroneous is set forth in Assignments of Error 68, 72-6, 78, 79.

2406-7.) This dead storage behind Norris Dam is shown upon drawings of Norris Reservoir storage contained in a technical article published by one of the TVA engineers (a witness for appellees) before the trial of this litigation and in drawings offered as exhibits in the *Ashwander* case[1] by another TVA engineer who also appeared as a witness for appellees in this suit.[2] (Bowman R. 1750; Kimball R. 1862; Comp. Exs. 904, 912*.)

The volume of this dead storage behind Norris Dam is 570,000 acre feet. The space occupied by this dead storage behind Norris Dam has no flood control value because it is always full of water and consequently can never be used to impound any flood waters. (Kurtz R. 1213; Add. Fdg. 70, R. 684; Comp. Ex. 362*.)

The next 65 feet of Norris Dam, that is, from elevation 955 to elevation 1020, is built and utilized to create *power storage*. (Kurtz R. 1212-14.) This power storage (Comp. Ex. 362*) is also shown on Comp. Ex. 904, which is a diagram of the Norris Reservoir storage prepared by the appellees' witness Bowman. (Bowman R. 1750.) This power storage at Norris Dam is provided and utilized to create additional head for power production and to provide usable storage of water for even greater production of

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[1] *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288.

[2] On Comp. Ex. 904, a drawing of Norris Reservoir prepared and published by appellees' witness Bowman after the trial of the *Ashwander* case and before the trial of this suit, the standard terms, that is "dead storage," "power storage" and "flood storage" are shown for the different types of storage at Norris. In the instant case, however, the engineering witnesses for the appellees in their testimony and exhibits have studiously avoided the use of these standard terms and substituted instead such coined terms as "minimum navigation level" for "dead storage" (even though the tributary reservoirs have no navigation facilities) and the coined term "controlled flood surcharge" for "power storage." (Def. Exs. 39, 42, 43, 45a, 46a, 47, 48, 53, 54, 151; Bowman R. 1730-1, 1733, 1749-50; Barker R. 1998; Comp. Ex. 904.)

power during the low water season, both at Norris Dam and at all the power plants on the main river below. (Kurtz R. 1212-14; Comp. Ex. 362*; Bowman R. 1734, 1739, 1742; Wessenauer R. 2189-90; Add. Fdg. 70, R. 684.) This power storage at Norris is filled annually. (Def. Ex. 90*.)

The volume of this power storage at Norris is 1,500,000 acre feet. This power storage has no genuine flood control value because, manifestly, if this space is full when the inevitable flood occurs, it is not available to impound the flood waters (Kurtz R. 1214; Add. Fdg. 70, R. 684); and whether any of this space will be empty when the flood occurs, and if so, how much, is not only uncertain and unpredictable, but is merely incidental to, and dependent upon, the power operations which utilize this power storage for power production. (Kurtz R. 1214; Def. Ex. 90*.) Floods do not occur just because the power storage of a dam happens to be empty. Nor do they fail to occur just because the power storage of a dam happens to be full. Genuine flood storage must be available whenever a flood occurs. (Kurtz R. 1213-14; Watkins R. 1560-2.)

There is an irreconcilable conflict between flood control and power development, that is, between keeping the reservoir space empty to catch the inevitable flood when it does occur and keeping the reservoir space full to create head and storage for power production.[1] There is no object in keeping water permanently or seasonally in a reservoir except for power production or for industrial or domestic use. This was conceded by appellees' witness Woodward when he stated that partial filling is not for flood control, but for the benefit of low water regulation, which in-

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[1] Were this not so, every private power development would be a flood control project, which it is not. Indeed, some surcharge capacity above the power storage is often necessary merely to compensate for natural valley storage destroyed by the power reservoir. (Watkins R. 1562, 1565-6; Kelly R. 1373; Comp. Ex. 411.*)

creases the amount of firm power. (Woodward R. 1788, 1798-9, 1815; Add. Fdgs. 80, 85, R. 686-7; Kurtz R. 1213-14.) The only flood control value in power storage is that undependable and accidental amount that is inherent in every power dam of every power company in the country, but such storage does not constitute flood protection because it is obviously impossible to fill a reservoir early in the year for power production, as the Norris Reservoir is filled, on the assumption that a prediction can be made that a great flood will not occur.[1] Great floods have occurred on head waters of the Tennessee and nearby rivers during the summer and at other times of the year. (Justin[2] R. 2376-8; Comp. Ex. 941; Kurtz R. 1198; Add. Fdg. 73, R. 684; Minser, Offer to Prove, R. 2365-8, 2370.)

The conflict between flood control and power development was recognized by appellees' witness Bowman in a technical article written prior to the trial of this suit (Bowman R. 1738, 1749-50; Comp. Ex. 904; Add. Fdg. 80, R. 686), and in a Congressional Hearing in 1937 (Comp. Ex. 116†, p. 344), by Dr. A. E. Morgan who testified:

> "For power development it is desirable to store water as quickly as possible during high water and to use it in low water. For flood control it is desirable

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[1] It is no more possible to make such a prediction than it is to tell whether a coming year will be a low water season. It is not possible to predict rainfall or to predict at any time of any year, whether the rest of the year will be dry or wet, and, manifestly, reservoirs cannot be operated on hindsight. (Add. Fdg. 55, R. 680; Woodward R. 1811, 1822; Kimball R. 1884; Floyd R. 1901-2.)

[2] Joel D. Justin, consulting hydraulic engineer on flood control, irrigation and hydro-electric developments in this country and abroad, including a large number of flood control projects now under construction and completed for the Federal Government; author of standard text-books and numerous technical articles on flood control, hydro-electric developments and related subjects. (R. 2373-5.)

to keep the reservoir capacity empty, as much as possible. For power development a full reservoir is best. For flood control an empty reservoir is best. There is a certain tendency to conflict there."

This examination of the structural and functional characteristics of the Norris project shows that the first 200 feet of Norris Dam above the river bed, or up to elevation 1020, impounds dead and power storage and produces the commercial power created by that project. This large power reservoir, creating the commercial power, has been purposefully and separately built; it is filled annually for power; it is drawn down annually for power; it is operated exactly the same as any power reservoir of any utility and it provides no flood storage except an undependable amount that is inherent in every power dam of every power company in the United States. (Kurtz R. 1212-14; Comp. Ex. 362*; Bowman R. 1734, 1739, 1741-2; Wessenauer R. 2189-90.)

The top 14 feet of Norris Dam, or from elevation 1020 to 1034, is built and utilized to create flood storage. This storage space, like all genuine flood storage, will be kept empty at all times except when it is temporarily in use to impound flood waters during a flood. Such flood waters will be released as rapidly as practicable in order to make the space available to catch the next flood. In other words, this storage space will be available to impound flood waters no matter what time of year the flood may occur, except that when filled beyond elevation 1029 or 1030, it will flood and has flooded towns, highways and bridges. (R. 1855; Woodward R. 1822; Kimball R. 1855; Bowman R. 1769.) This top 14 feet of the dam is the precise equivalent of a 14 foot dam built as an entirely separate and distinct project on the top of the power reservoir or of a flood control reservoir of equal capacity built along side of the power reservoir. This top 14 feet is the only genuine flood

control storage provided in the Norris Project.[1] (Kurtz R. 1210, 1214; Comp. Exs. 362*; 904.)

The volume of this flood control storage is 497,000 acre feet. (Kurtz R. 1210, 1214; Comp. Ex. 362*; Add. Fdg. 70, R. 684.) This flood storage at Norris Dam can not and does not produce any commercial power for the very simple reason that this space is always kept empty to impound flood water when a flood occurs and the impounded flood waters are discharged as rapidly as practicable. Consequently none of the commercial water power created by the tributary dams, of which Norris is typical, can be or is created by the operation of any flood control structure. (Kurtz 1214; Add. Fdg. 70, R. 684.)

The evidence shows that the Norris project consists of a large power reservoir (dead storage and power storage) upon which is superimposed a small flood control reservoir (flood control storage). The power reservoir is 200 feet high measured from the bottom of the river and the superimposed flood control reservoir is only 14 feet high. The power reservoir, separately and purposefully built, creates all of the commercial power, but it does not provide any genuine flood control; and the small flood control reservoir does not, incidentally or otherwise, produce any commercial power.

The trial court excluded as immaterial official statements issued by TVA, stating that "*Norris Dam is being built for power development*" (Comp. Ex. 863, excluded, R. 3829) and that:

> "If we admit that the use of electricity can not be increased manyfold; if that is our mental attitude, then

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[1] The tributary reservoirs are far beyond prediction distance from the Mississippi River. (Woodward R. 1783, 1806-8.) Hence, for this and other reasons, the limited flood storage of the tributary reservoirs could not benefit Mississippi floods. (See pp. 57-60, *infra*.)

we must be logical and immediately stop construction of the Cove Creek Dam (Norris) and of the Joe Wheeler Dam." (Comp. Ex. 800, excluded, R. 3706.)

Prior to the construction of Norris Dam, appellee, Dr. A. E. Morgan, while testifying before the House Committee on Appropriations (Comp. Ex. 108†, p. 25, R. 2621-2) in 1933. frankly admitted that it was to be built for the development of power:

> "Mr. Collins: You will build the same type of dam (at the site of Norris) that you would build if there was a scarcity of power, and you were building it for the development of further power. In other words, you will build that kind of dam.
>
> Dr. Morgan: Yes, sir."

The record thus discloses not only that the small flood control structure superimposed on the top of the Norris project creates none of the commercial power, but that power development was the primary and dominant purpose of the construction of the Norris project as well as of the other tributary projects. (Crane R. 1284; Kurtz R. 1218-19; Dr. A. E. Morgan, Comp. Ex. 112†, pp. 252-3, 287, R. 2674, 2680; Add. Fdg. 73, R. 684.)

(b) *Two and six-tenths times as much flood storage could have been provided at the site of Norris Dam for less than one-quarter of the cost of Norris Dam.* Norris Dam cost $36,310,370. (Fdg. 29, R. 600; Kurtz R. 1210; Comp. Ex. 362*; Comp. Ex. 116†, p. 403, R. 2700A.) This dam provides genuine flood storage of only 497,000 acre-feet with no allowance for the destruction of natural valley storage by the power structure upon which the small flood control structure is superimposed. A flood control dam could have been built at the same site as the Norris Dam for $8,136,000, providing 1,312,000 acre-feet of genuine

flood storage. (Add. Fdgs. 69, 70, R. 683-4; Kurtz R. 1210, 1214; Comp. Ex. 362*.) TVA engaged the Bureau of Reclamation to design the Norris Dam. (Comp. Ex. 113°, p. 2.) This Bureau, through one of its engineers, reported that a reservoir for flood protection alone with flood storage of 1,255,000 acre-feet could be built at the site of the Norris Dam for approximately $7,150,000. (Woodward R. 1816.) *This project would have produced no electric power.* This evidence shows that two and six-tenths times as much flood storage could have been provided at the site of Norris Dam for less than one-quarter of the cost of Norris Dam and that Norris Dam was built for some other purpose than flood control. (Add. Fdgs. 69, 70, R. 683-4.) That purpose is the maximum production of power as stated in the TVA Act itself. (TVA Act, Sec. 17.) Norris is typical of all the TVA tributary projects (see p. 38, *supra*). The trial court excluded authorized public statements by appellees that Norris Dam was being built for power development and that its construction is not justified unless there is a market for the power.[1]

(c) *The tributary projects increase five-fold the amount of firm power which could otherwise be produced on the Tennessee River.* These tributary projects increase the firm continuous capacity of the TVA power project from 110,000 kilowatts to 660,000 kilowatts. (Add. Fdg.

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[1] "The Norris Dam is being built for power development, but that is not an end in itself. We do not develop power just so that there can be power development. We develop power to contribute to the well-being of the people in this region. It is only a means to an end. The object of building a dam is to provide power; the object of providing power is to raise economic and social conditions of a region." (Comp. Ex. 863, excluded, R. 3829.) "Take the Norris Dam, for instance. It would not pay to build it in the hope that somebody might wish to buy its power in the future. It is not justified unless you can count on a market. That is true for other up-river dams." (Comp. Ex. 844, excluded, R. 3798.)

11, R. 673; Comp. Ex. 328°, p. 62; Kurtz R. 1215; Comp. Ex. 115†, p. 279, R. 2697.) None of this increase in firm power results from any flood control storage provided at any of the tributary reservoirs but solely from the utilization of the power storage provided at those reservoirs. The evidence shows that the appellees have faithfully followed the statutory mandate to construct the Cove Creek (Norris) Dam "*so that the maximum amount of primary power may be developed* at Dam Numbered 2 (Wilson) and at any and all other dams below the said Cove Creek Dam." (TVA Act, Sec. 17.) The trial court in its opinion expressly finds that the statute required Norris Dam to be constructed and operated so that the maximum amount of primary power may be developed at all other dams downstream and that "Norris Dam was built and is being operated to create extra head of water power at Wilson Dam." (R. 559.) The TVA reservoirs are constructed to produce the maximum amount of power (Crane R. 1284; Kurtz R. 1218-19; Dr. A. E. Morgan, Comp. Ex. 112†, pp. 252-3, 287, R. 2674-80.) And Judge Gore found that the proposed method of operation of all the TVA dams is not for flood control but primarily for the purpose of power. (Add. Fdg. 73, R. 684.)

(d) *The TVA Unified Plan will provide no flood protection on some of the most important tributaries of the Tennessee River where the greatest flood damage has been experienced.* The TVA Unified Plan provides no flood protection on the Holston River or the French Broad River which are two of the most important tributaries of the Tennessee River.[1] (Comp. Ex. 328°, p. 12; R. 1209; Kurtz

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[1] The trial court excluded an official TVA Press Release stating that the building of tributary reservoirs has been determined by the opportunities for power development:

"The Tennessee Valley Authority has been importuned by many people to prepare designs for a water power dam

(Continued on page 47)

R. 1205; Comp. Exs. 354*, 355; Kimball R. 1852, Watkins R. 1583.) On the Emory River where seventy-five per cent of the total flood damage on all tributaries occurs and where twenty-two lives were lost in the 1929 flood, no protection whatsoever is afforded by the TVA Unified Plan (Kurtz R. 1196, 1199, 1207, 1209; Kimball R. 1886; Watkins R. 1583; Add. Fdgs. 50, 64, R. 680, 683.) Any genuine flood control system would provide protection on these important tributaries.

The estimated annual average flood damages on the French Broad River are $110,416, on the Holston River $28,850 and on the Emory River, exclusive of damage to lands, $355,500, or a total of $495,260. (Comp. Ex. 105°, p. 734, Col. 16; Comp. Ex. 349, Col. 9, R. 3084-B.) On the other hand, the estimated average annual flood damages on the Hiwassee (including the Ocoee) are $21,725, on the Little Tennessee River (including all its tributaries) are $26,495 and on the Clinch River, exclusive of damage to lands, are $33,590 (Comp. Ex. 549, R. 3084-B), and including the damage to lands on the Clinch, Emory and Powell Rivers (not segregated), the average annual flood damages on the Clinch River would be about $46,000 a year. (Comp. Ex. 105°, p. 734, Col. 6.)

Thus the total average annual flood damages on the Clinch, Hiwassee and Little Tennessee Rivers (including an excessive amount for damages to lands on the Clinch) are $94,220. The trial court excluded, as immaterial, evidence

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and regulating reservoir on the French Broad just above Asheville. The topography of this site affords a natural reservoir basin which, considered for its physical aspects alone, is one of the best of such sites in the Tennessee Valley. However, the preliminary data available at the present time regarding this proposed project appear to indicate that *the cost of water power produced there would be so much greater than the cost of similar power produced at other locations*, that we are forced to the conclusion that the construction of a dam at this site is not economically justified at the present time." (Comp. Ex. 872, excluded, R. 3856.)

that the average annual value of crops standing in September and October on lands which will be flooded by the Chickamauga, Guntersville, Pickwick Landing and Wheeler reservoirs at normal pool level was $3,126,000, or an average of over $20 per acre. (Offer to Prove, R. 1244-50; Def. Ex. 153†, p. 947.) On the same basis, the total value of crops on lands flooded, or to be flooded, by the three tributary reservoirs, would be approximately $992,000 annually. (Def. Ex. 153†, p. 919.) While the average annual value per acre of crops in the tributary basins is doubtless less than in the Tennessee Valley, the average annual value of the crops destroyed by the tributary reservoirs is a very substantial figure.

The capitalized value at 4 per cent of the total average annual flood damage on the Clinch, Hiwassee and Little Tennessee Rivers, is less than $2,400,000. The three TVA projects on these tributaries, which would eliminate only a part of this average annual flood damage, will cost approximately $120,000,000.

The greatest practicable flood protection on the tributaries and on the main river could have been obtained at a fraction of the cost of the TVA system by the construction of genuine flood control reservoirs on the Emory, Holston, French Broad, Clinch and Hiwassee Rivers. Such a system of genuine flood control structures, built and operated solely for flood control, could have been built for about one-sixth of the cost of the TVA power projects (see pp. 55-57, *infra*) and for about $40,000,000 less than the cost of the three tributary power projects alone. Such a system would provide ten times as much flood storage in a great flood at and above Chattanooga (where practically all flood damage in the Tennessee Valley occurs) as the TVA Unified Plan, and an immeasurably greater ratio of protection to life and property (Kurtz R. 1205-7; Comp. Ex. 353, 355, 357*); for the limited flood storage of the small flood control reservoirs constructed on top of the TVA power

structures would have a negligible effect and be of negligible value in a great flood when flood protection is the most needed and the most valuable. (Comp. Exs. 352*, 354*, 356, 357*, 358*, 359*.)

Main River Projects. (a) *None of the commercial water power created by the main river projects is created by the operation of any flood control structures.* This appears from an examination of the evidence bearing upon the structural and functional characteristics of the main river projects. We have previously pointed out that five-sixths of the firm water power which will be created by the TVA Unified Plan is created by the use of the tributary projects. (See pp. 45-46, *supra.*) However, the remaining 110,000 kilowatts of firm power which could be produced at the main stream dams without the tributary projects is not brought into being by the operation of any flood control structures. (Kurtz R. 1213.) The Guntersville project is a typical main river project. It is sufficient, therefore, to examine the structural and functional characteristics of a typical Tennessee River project.[1]

The Guntersville Dam which is located on the Tennessee River about midway between its mouth and its source, is approximately 60 feet high from its foundation to the top of its gates and extends 40 feet above its normal tailwater at elevation 555 to the top of its gates at elevation 595. (Comp. Ex. 328°, p. 82; Def. Ex. 45A.) The first 36 feet above normal tailwater is built and utilized to impound water permanently up to elevation 591, which is commonly called minimum headwater elevation, but which has been denominated minimum "navigation level" by the ap-

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[1] The TVA dams on the main river are Pickwick Landing, Wheeler, Guntersville, Chickamauga, Watts Bar, Coulter Shoals and Gilbertsville which does not differ from these main stream projects in nature or function but does include a larger amount of flood control storage so its functions will be examined separately.

pellees for the purpose of this suit. (Comp. Ex. 328°, p. 82; Def. Exs. 44*, 45A.) This dead storage at Guntersville differs from the dead storage at Norris only in that this storage behind the Guntersville Dam incidentally provides a water surface which must be used by navigation in lieu of the navigation pools of the Federal Navigation Project which are submerged by the large power lake of the TVA power project. As shown by the evidence reviewed at pages 22-36, *supra*, the main stream reservoirs are power developments with merely incidental navigation facilities, but from the standpoint of flood control, it is immaterial whether this storage is regarded as dead storage or navigation storage; for in any event, it has no flood control value because it is always kept full of water and consequently can not be used to impound flood waters when floods occur. (Kurtz R. 1213; Wessenauer R. 2189; Creager, Offer to Prove, R. 2406-7; Add. Fdg. 70, R. 684.) However, this dead storage, by concentrating the fall of the river at the dam, produces firm or commercial power. (Kelly R. 1373; Kurtz R. 1210, 1213; Wessenauer R. 2189-90.) The volume of this dead storage is 709,000 acre feet. (Def. Ex. 45A.)

The next three feet of the Guntersville Dam, that is, between elevations 591 and 594, is built and utilized to create power storage. (Kelly R. 1373; Kurtz 1210, 1213; Wessenauer R. 2189-90.) The volume of this power storage is 177,000 acre feet. (Def. Exs. 54, 153†, p. 975.) This power storage will be filled after April 1st of every year. (Wessenauer R. 2190.) The only purpose of filling this power storage annually is to provide additional storage for the production of power. It would not be filled for navigation because the dead storage has already provided navigable depths. A contrary contention would admit that the incidental navigation facilities of the TVA Power Project are completely inadequate except when the power storage is entirely filled. It would not be filled for

flood control because flood control demands that flood control space be kept empty for the inevitable flood whenever it may occur. Floods may occur and have occurred at any time of the year. (Add. Fdg. 73, R. 684; Justin R. 2376-8; Comp. Ex. 941; Kurtz R. 1198, 1204; Kimball R. 1882; Minser, Offer to Prove, R. 2365-8, 2370.) The uncertain possibility that some unpredictable amount of this power storage, which is regularly filled annually, may happen to be empty at the time of a flood as the incidental result of power operations, just as in the case of any privately owned and uncamouflaged power reservoir, does not constitute flood control. The evidence thus shows that there is nothing incidental about the creation of water power which is created by purposefully building storage for that purpose. This power storage provides no genuine flood control. (Kurtz R. 1214.)

The top one foot of the Guntersville Dam, that is, between elevation 594 and 595, provides the only genuine flood control storage included in the Guntersville project. This storage will be kept empty at all times of the year in order to impound flood waters when the inevitable flood occurs and the impounded flood waters will be released as rapidly as practicable. The volume of this flood control storage at Guntersville is 65,000 acre feet, and because it is kept empty, like any *bona fide* flood control reservoir, it creates no firm or commercial power. (Def. Exs. 45A, 54; Kurtz R. 1213-15.)

The evidence thus shows that the Guntersville project consists of a power dam 39 feet high from its normal tailwater to its normal water surface at elevation 594, on top of which is superimposed a flood control dam one foot in height. The total storage up to normal pool level or the top of the power dam is 886,000 acre feet. (Def. Ex. 54.) The flood storage provided by the superimposed flood control dam is only 65,000 acre feet. This flood storage is too

insignificant in amount to be of any practical value and does not even compensate for the natural valley storage destroyed by the dead and power storage in a great flood. The evidence thus shows that the Guntersville project is the equivalent of a power dam 39 feet high (which produces all of the firm or comercial power), on which is superimposed an entirely separate flood control structure one foot in height[1] which creates no firm or commercial power.

The Gilbertsville project on the main stream does not differ from the other main stream projects in nature or function, but the flood storage at Gilbertsville[2] is much greater both in volume and in relation to its dead and power storage than in the case of the other main stream projects. (Def. Ex. 39.) The flood storage at Gilbertsville can provide no flood protection for the Tennessee Valley because this dam is located only a short distance above the mouth of the Tennessee River and because the land along the river below the Gilbertsville site has been and will continue to be subject to flooding by backwater from the Ohio River. On the contrary, it permanently floods 160,000 acres of valuable valley lands. (Def. Ex. 153†, p. 919.) While the evidence hereinafter reviewed shows that the flood storage at Gilbertsville does not provide any measurable or consequential flood protection on the Mississippi River, that is not material in this connection because whatever may be the volume of flood storage at Gilbertsville (and it has been repeatedly changed on paper even during the trial of this suit (Bowman R. 1726-7)), and whatever

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[1] The heights of the superimposed flood control structures on the remaining main river dams are as follows: Pickwick, 5 feet; Wheeler, 1 foot; Chickamauga, 3 feet; Watts Bar, 5 feet; Coulter Shoals, 5 feet. (Def. Exs. 42-54; Comp. Ex. 328°, p. 82.)

[2] The height of the superimposed flood control structure on top of the Gilbertsville power dam is 16 feet. (Def. Exs. 39, 54.)

may be its effect, if any, on flood stages in the Mississippi Valley, the flood storage at the Gilbertsville project creates none of the firm or commercial power to be created by the TVA Unified Plan. This is because the genuine flood storage at the Gilbertsville project would always be kept empty in order to impound flood waters when the inevitable flood occurs. As in the case of the other main stream projects, all of the firm or commercial water power at Gilbertsville will be created by the power dam which will provide no genuine flood control.

(b) *That flood control is a minor part and purpose of the main river projects also appears from the fact that the small flood control structures superimposed on them do not provide adequate or dependable flood control.* The trial court found that practically all damage from floods on the main stream occurs at and above Chattanooga, and that "a flood control program to achieve the maximum practical protection upon the Tennessee River and its tributaries should be directed primarily for protection at and above Chattanooga." (Fdgs. 81, 85, R. 619; Kurtz R. 1196-7; Comp. Ex. 349, R. 3084; Watkins R. 1582.) During large floods the main river dams above Chattanooga are wholly flooded out and provide no flood storage capacity.[1] (Comp. Ex. 359*; Kimball R. 1868-9; Add. Fdgs. 65, 83, R. 683, 686.) Any dependable reduction in the maximum flood stage at Chattanooga by the TVA Unified Plan is insignificant, and even the maximum undependable reduction in such stage which might be achieved under the most favorable conditions would not be sufficient to render practicable the construction of levees at Chattanooga for local protection. (Add. Fdg. 63, R. 683; Kurtz R. 1206-8; Comp. Exs. 356,

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[1] "The Chickamauga Dam is completely flooded out with the top of its gates under seven to nine feet of water by the maximum flood to be expected at Chattanooga." (Add. Fdg. 65, R. 683.)

R. 3088, 357*, 359*; see also Dr. A. E. Morgan, Comp. Ex. 895, excluded, R. 3908.) Protection by levees is the only practicable way to protect Chattanooga from floods. (Kurtz R. 1209; Kimball R. 1867-9.) The dams below Chattanooga do not protect property in the Tennessee Valley against flood damage but permanently submerge thousands of acres more land than is occasionally damaged by floods in a state of nature. (Fdg. 82, R. 619.) This results in destroying the roads, buildings and other improvements on the land permanently submerged. Flood damages below Chattanooga to cities and towns are relatively small in amount (approximately one per cent of the damage to cities and towns on the main river), and while there are some damages to railroads and highways (easily eliminated by relocation), such flood damages *consist largely of damages to farm land.* (Kurtz R. 1196-7; Comp. Ex. 105°, p. 734; Comp. Ex. 349, R. 3084; Fdg. 82, R. 619.) The main stream dams of the TVA Unified Plan *forever flood and therefore destroy* 415,700 acres of valuable farm land and the total land purchased by TVA along the main stream for flooding, exclusive of Watts Bar and Coulter Shoals, is 740,800 acres. (Def. Ex. 153†, pp. 919, 947.) This alleged flood control forever floods the very land that it should protect.

(c) *The main river projects of the TVA Unified Plan destroy a large volume of valley storage.* Valley storage is that storage which reduces the height of floods in a state of nature. (Kelly R. 1372-3; Comp. Ex. 411*; Watkins R. 1586; Clemens R. 1663-4; Kimball R. 1869, 1875-6; Comp. Ex. 914.*) Unless a reservoir or chain of reservoirs provides a sufficient amount of flood storage to offset this volume of destroyed valley storage, that reservoir or chain of reservoirs will accelerate and increase the flood heights below. The main river dams of the TVA destroy more valley storage than they provide flood storage. (Watkins R. 1562-5; Comp. Ex. 105°, p. 71, par. 39; Add. Fdg. 82, R. 686.)

(d) *The main river projects are likely to add to flood hazards by increasing flood heights on the river below.* The appellees must depend upon attempts to draw down the main river reservoirs in order to obtain any flood control or even partially to offset the destruction of valley storage. Prediction of the height and duration of floods is unreliable. (Woodward R. 1811.) Any attempt to draw down power storage in advance of floods will be likely to aggravate flood conditions (Watkins R. 1564-6) and in any event is impracticable. Such operation of the Wheeler Reservoir of the TVA system during the flood of 1937 increased the flood height on the Mississippi River over what it would have been had Wheeler Reservoir not existed. (Woodward R. 1807; Floyd R. 1901; Add. Fdg. 66, R. 683.)

(a) *That the achievement of flood control is neither the objective nor the result of the TVA Unified Plan appears from a comparison of its costs, physical aspects and ineffectiveness with the costs, physical aspects and the effectiveness of a genuine flood control system.* Had flood control been a primary, or even a coordinate, objective of the TVA Unified Plan, the evidence shows that a genuine flood control system could have been built which would have provided many times more dependable flood protection at a fraction of the cost of that Plan. (Add. Fdgs. 58, 60, 61, 67, R. 681-3; Kurtz R. 1200-10; Comp. Exs. 352*-359*, incl.) The greatest practicable protection in the Tennessee Valley area could have been obtained by a system of genuine flood control reservoirs for flood protection only at a cost of approximately $81,000,000, as compared to the cost of the TVA Unified Plan of $473,650,000.[1] (Kurtz R.

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[1] The significance of the facts that the structures in the TVA Unified Plan (with the exception of some minor flood control structures built on top of the power structures) are not adapted to or useful for flood control, that many times more flood control

(Continued on page 56)

1210; Comp. Ex. 361*.) This system of genuine flood control reservoirs would provide almost ten times as much flood storage in a great flood at and above Chattanooga (where practically all flood damage in the Tennessee Valley occurs) as the TVA Unified Plan (Kurtz R. 1205-7; Comp. Exs. 353, 355, 357*), and would in no way interfere with any navigation development on the Tennessee River. (Add. Fdg. 58, R. 681; Kurtz R. 1202; Kelly R. 1391.) It would provide an immeasurably greater ratio of protection to life and property. (Kurtz R. 1205-7; Comp. Exs. 353, 355, 357*.) It would provide protection on all of the principal tributaries of the Tennessee and would control 78 per cent of the drainage area above Chattanooga in comparison to 25 per cent by TVA. (Add. Fdgs. 46, 57, 60, 61, 67, R. 679, 681-3; Kurtz R. 1205-6; Kimball R. 1855.) The estimated reduction of more than 19 feet in stage of the maximum flood at Chattanooga by such a system of flood control reservoirs would be sufficient to render practicable the construction of levees at Chattanooga necessary for local protection, whereas any reduction which may result from the TVA Unified Plan is not sufficient to render practicable the construction of such levees. (Add. Fdgs. 62, 63, R. 682-3; Comp. Exs. 356, 357*; Kurtz R. 1207-9.)

The total average annual flood damages on the Tennessee River and all its tributaries (including estimated damages from a hypothetical 500-year flood) is only $1,784,000. (Comp. Ex. 105°, p. 734, col. 16.) The capitalized

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could be achieved by constructing bona fide flood control structures at a fraction of the cost of the TVA Unified Plan and that such relatively minor flood control structures as have been superimposed upon the main TVA power structures do not produce any commercial power, is not that a better flood control plan could have been designed (as the trial court erroneously assumes in disposing of this issue, Opinion R. 561) but that, with the minor exception above noted, the structures in the TVA Unified Plan are unrelated to flood control and that such minor flood control structures, as have been superimposed on the TVA power structures, produce no commercial power.

value of these flood damages at 4 per cent is less than $45,000,000. The projects of the TVA Unified Plan, costing over $473,000,000, eliminate only a portion of this average annual flood damage and permanently flood more land than is occasionally flooded in a state of nature. (Fdg. 82, R. 619.)

The TVA Unified Plan does not give adequate flood protection because TVA has spent its funds on large power reservoirs on a few tributaries rather than in building flood control reservoirs on all the important tributaries at much less cost and because all of the TVA dams have been, or are to be, built as power dams for the maximum production of power. (Crane R. 1284; Kurtz R. 1218.)

(b) *The TVA Unified Plan will not decrease the cost of the flood protection system on the Mississippi River or have any appreciable effect on the control of Mississippi floods.* The present system of flood protection and flood control on the Mississippi River below Cairo consists of levees, by-passes (floodways) and channel rectification known as the Jadwin Plan. (Comp. Exs. 409,* 410.*) It was adopted by Congress in 1928 following the great flood of 1927.[1] Recently General Markham, while Chief of Engi-

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[1] Prior to the Rivers and Harbors Act of May 15, 1928, Congress had never adopted a federal project to provide a complete levee and flood protection system along the Mississippi River from Cairo to its mouth. Previous to that time flood protection on the Mississippi had been a mixture of localized federal projects for navigation purposes and levees constructed by States and their political subdivisions. Due to inability or unwillingness to finance such work, the levee sections under state and local jurisdiction were frequently not built up to grade or properly maintained. (Okey R. 1928.) While not controverting the main facts herein stated, the appellees offered some testimony consisting, we think, of trifling and impracticable suggestions for improving or increasing the factor of safety of the Jadwin Plan without regard to the astronomically inverse relation between the cost of the suggested frills and the most optimistic prediction of benefits. The trial court refused to permit the appellants to offer any rebuttal on this point; and if any such criticism or suggestion be thought material, then the ruling of the court precluding the offer of rebuttal is plainly reversible error. (See Offers to Prove, Knappen R. 2350-60; Justin R. 2378-86; Creager R. 2402-13.)

neers, recommended certain modifications which included changes in the by-passes and channel rectification which experience had shown to be very effective in reducing flood heights within the levees. (Add. Fdg. 47, R. 679; Kelly [1] R. 1368-70, 1374; Comp. Ex. 410.*) The Jadwin Plan, as modified at the recommendation of General Markham, although not yet completed, has taken care of every flood which has occurred on the lower Mississippi since 1928, including the great flood of 1937. (Add. Fdg. 47, R. 679; Kelly R. 1379; Clemens R. 1672; Okey R. 1929.) Judge Gore further found in accordance with the manifest weight of the evidence that the completed Jadwin-Markham Plan would have been sufficient to control the Mississippi floods of 1912, 1913 and 1927 (Add. Fdg. 84, R. 687) and will be sufficient to control the maximum flood to be anticipated on the Mississippi River (Add. Fdg. 79, R. 685; Clemens R. 1672; Kelly R. 1374, 1378; Okey R. 1929, 1931) and that "the construction of the TVA Unified Plan would not avoid the necessity of completing the Jadwin-Markham Plan or decrease its cost by a single dollar." (Add. Fdg. 48, R. 679; Kelly R. 1367-8, 1374; Knappen, Offer to Prove, R. 2353.)

Even genuine flood control reservoirs on tributaries have no appreciable effect on Mississippi floods. Tributary reservoirs cannot be operated for local flood protection, requiring the release of flood water immediately after the passing of the local flood danger, and for the reduction of peak stages on a distant river into which the tributary flows, requiring the reservoirs to be kept empty regardless of local flood conditions until a dangerous stage approaches upon the main river. (Add. Fdg. 81, R. 686; Kelly R. 1372, 1371; Offers to Prove, Knappen R. 2350-1, Creager R. 2409.) Evidence in the record and official documents of which this

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[1] For statement of Colonel Kelly's experience in relation to Mississippi flood problems, see footnote, p. 25, *supra*.

Court may take judicial notice establish that for over fifty years the Chief of Engineers has held that storage reservoirs on tributary streams are of uncertain, negligible and undependable value for flood protection on the Mississippi and that their value for local flood protection, power development and other local uses far exceeds any possible value for flood protection on the Mississippi.[1] (Comp. Ex. 105°, p. 3, par. 12; Def. Ex. 32†, p. 2, par. 8; Add. Fdg. 49, R. 680.)

The record clearly shows that certain inner levees under the Jadwin-Markham Plan are designed to be overtopped when a Mississippi River flood reaches a certain height and behind those levees are provided spillways or by-passes, confined by natural elevations or outer lines of levees, to carry the flood water and reduce flood heights. (Kelly R. 1369-70; Comp. Ex. 410*; Clemens R. 1639-42; Okey R. 1906, 1931.) Such outer levees are an essential element of any system of flood protection on the lower Mississippi River. At most in peculiar, unpredictable and undependable conditions surrounding a flood falling within a narrow range of magnitude, the TVA Unified Plan might eliminate the operation of some of the floodways. This possibility is not only too remote and speculative for con-

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[1] Kimball offered Defendants' Exhibit 83* to show how it would have been possible to lower the peak of a moderate Mississippi flood occurring in 1929 (when the flood did not overtop the inner levees and had peaks of short duration and hence of small volume), by storing only a relatively small portion of the peak of the flood, if one only knew just exactly when the peak was to occur, how high it would be, and just exactly how to skim off the right amount of the peak and no more. Kimball admitted that this was purely an arithmetical computation made after the flood, which, apart from the question of the practicability of providing, or the availability of, facilities which could be operated in such a manner, required none of the prescience which would have been necessary to accomplish this astounding perfection by action worked out in advance of, or concurrently with, the flood. (Kimball R. 1876-7; Floyd R. 1901-2.)

sideration but also inconsequential in character. These floodways were not only flooded in a state of nature, but flowage rights have been or are being purchased under the Plan by the government and in any case they are only used once in ten or fifteen years with relatively small damage. (Kelly R. 1367; Clemens R. 1669-72; Okey R. 1931; Add. Fdg. 48, R. 679.)

As *General George B. Pillsbury, then Assistant Chief of Engineers,* said when testifying before the Committee on Military Affairs, House of Representatives, 74th Congress, 1st Session, with reference to any claimed flood benefits which might be anticipated from the construction of the TVA power dams, "*the effect on the Mississippi would be measured in inches and fractions of an inch in a high flood.*" And when pressed further, General Pillsbury said that *the construction of the TVA dams on the Tennessee River would not in his opinion "have an appreciable effect on the flood waters of the Mississippi.*" (Comp. Ex. 365†, p. 305.)[1]

(4) The creation of the water power by TVA is not, and will not be, an exercise of the war power.

The TVA projects constructed and proposed to be constructed on the tributaries and to some extent those upon the Tennessee River above Wilson Dam increase the firm capacity of Wilson Dam for power purposes. (Fdgs. 72, 74, 89, 90, 91, 92, R. 617-620.) The appellees contended below, and the trial court seems to have thought,

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[1] To the extent that Fdgs. 62, 63, 65, 66 (R. 613-4) state or imply that the flood protection works now nearing completion on the Mississippi are inadequate or that the TVA projects on the Tennessee River and its tributaries will have any appreciable effect on flood heights on the Mississippi, they are bare conclusions unsupported by findings of essential underlying facts or by evidence, are contrary to the clear weight of the evidence, and are based upon an erroneous conception of law. (See p. 128, *infra*.)

that the construction of Norris Dam was an exercise of the war power because it increased the firm power capacity of Wilson Dam. (Opinion R. 559.) Unless these findings may be regarded as having some bearing upon this issue, as we think they may not, there is no finding and no evidence to support any contention that the TVA Unified Plan is an exercise of the war power. The last Annual Report of TVA discloses that the maintenance of the idle nitrate plants at Wilson Dam is the only alleged national defense activity of TVA. (Def. Ex. 154°, p. 108.)

The entire amount of power produced or to be produced by TVA (except a negligible quantity used for the manufacture of fertilizer at Wilson Dam and presumably temporarily for dam construction (Karr R. 2222; Def. Ex. 147)) is to be transmitted, distributed and sold *for domestic, commercial and industrial uses in displacement of the facilities and businesses of the appellants and other existing utilities.* (See pp. 86-89, *infra.*) This does not result in any net increase in the electric facilities or power supply of the nation.

D. THE EXTENT, LOCATION AND NATURE OF APPELLANTS' PROPERTIES AND BUSINESSES.

The appellants are 16 public utility corporations engaged in supplying electricity to the public in territories in which the TVA is offering, or upon the completion of the TVA Unified Plan will offer, electricity for sale in quantities unlimited in relation to the available market. All, or a substantial part, of the service or market area of each appellant lies within 250 miles of the electric grid system or power pool which will be created under the TVA Unified Plan—a plan which is only a stage in the hydroelectric development authorized by the statute. (See Maps Comp. Exs. 7,* 12,* 27,* 29,* 33,* 37,* 41,* 45,* 49,* 74,* 82,* 89,* 101,* 327*; Fdgs. 1, 6-23, R. 585-598.) The appel-

lants have investments in property devoted to public service of more than $600,000,000. They have securities outstanding, exclusive of common stock, in the amount of more than $400,000,000. (Fdgs. 6-23, R. 585-598.) They have 11,000 miles of transmission lines and approximately 22,000 miles of distribution lines. They have more than 750,000 customers in 2650 communities. They sold approximately 5,000,000,000 kilowatt-hours of electricity in 1936. Approximately 75 per cent of their sales in kilowatt-hours are made to industrial consumers. They have more than 16,000 employees. In 1937 they paid approximately $16,000,000 in taxes to Federal, State, County and other local governments.[1]

The States in which they are rendering electric service are Tennessee, Mississippi, Alabama, Georgia, North Carolina, South Carolina, Virginia, West Virginia and Kentucky, which include all of the States of which any part lies in the Tennessee River basin. (Fdgs. 6-23, R. 585-598; Comp. Ex. 327.*) They are all engaged in the *local intrastate business* of distributing electricity, *and each is subject to State regulation as to its rates and service.* (Fdgs. 1, 26, R. 585, 599; Comp. Ex. 2, R. 2450.) Each of the appellants maintains and operates its utility system and facilities under State franchises granted pursuant to regulatory statutes of the State or States in which it carries on its business. (Fdgs. 1, 6-23, R. 585-598; Comp. Ex. 2, R. 2450.) The privilege of constructing, maintaining and operating such facilities has been granted to each of appellants subject to numerous restrictions, obligations and public duties imposed by State statute. (For illustration, see App. pp. 39-46.) Each of appellants also holds franchises (conceded for the purpose of this suit to be nonexclu-

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[1] Fdgs. 6-23, 25 (R. 585-599); Comp. Exs. 6, 10, 15, 17, 20, 23, 24, 28, 30, 31, 35, 36, 38, 40, 46, 47, 48, 55-60, 67, 68, 69, 73, 76, 80, 81, 84, 85, 86, 95, 96, 97, 100, 102, 104, 500.

sive) for the distribution and sale of electric energy within the corporate limits of the various municipalities and, in some instances, within the counties where it operates. (Fdg. 28, R. 599; Comp. Ex. 3, R. 2453.)

The businesses of the appellants have been built up over a long period of years.[1] Their facilities have been developed to meet the needs of the particular markets which they respectively serve. In that process of development, as illustrated by Complainants' Exhibits 54* and 336*, the properties of each of the appellants have become integrated units so that the loss of any part of their respective markets would seriously affect the economy and efficiency of the service to their remaining markets. (R. 830; 1106-1108.) Many of the appellants operate as adjuncts to their electric businesses such enterprises as transportation systems, water systems, ice plants and telephone systems. For many years these businesses have been operated under the same management with the electric operations as a single operation and the severance of the electric business from such other businesses would have an adverse effect upon such appellant. (Fdgs. 6, 8, 10, 11, 20, 21, 22, R. 585-597.)

Each of the appellants has played an active and important part in promoting and developing the economic growth of the territory which it serves. (Add. Fdg. 124, R. 708; Stanley R. 934-940;[2] Comp. Ex. 182*.) Not one of these companies has ever failed to supply the demands and requirements of the markets in which it operates. (Fdg. 116, R. 627.) The facilities of the appellants have been designed and constructed to permit extensions and provide

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[1] Fdgs. 6-23, R. 585-598; Comp. Exs. 10, 15, 23, 28, 30, 35, 38, 46, 55-63 inclusive, 76, 84, 85, 96, 104; R. 771-772, 787-788, 809, 822, 829-830, 846, 856, 885-886, 934-940.

[2] After part of this line of testimony had been given, the testimony concerning the Alabama Power Company was at the suggestion of the court accepted as typical. (R. 936, 965, 972.)

for future growth in business (Fdgs. 6, 8, 13, 16, R. 586-593), and each of the appellants has aggressively sought to stimulate and has stimulated the demand for and use of electric power in the territory which it serves both on the part of existing customers and on the part of potential customers. (Add. Fdgs. 124-127, R. 708-709; R. 772-3, 788, 796, 856, 934-940; Comp. Exs. 182*, 183*, 184*.) Each has maintained a department with the duty, among other things, of securing the location of new industries and businesses in its territory. (Add. Fdg. 125, R. 708; 935-936; Comp. Ex. 182*; R. 773, 778.)

The evidence is uncontradicted that in the territory served by the appellants there is no substantial unattached electric power demand. (Fdgs. 117-119, R. 627-8.) While there are a few industrial plants which still manufacture their own power, most of these do so because of the fact that they require steam in processing operations or because they have fuel by-products from which power may be produced at little or no cost, and not because central station electric service is not available. (Fdg. 117, R. 627-8.) The only unattached domestic demand for electric service beyond the reach of existing lines of the appellants, is of such a character,—for the most part widely scattered farm dwellings,—as not to justify line extensions at the present time, either under minimum requirements of applicable State regulations or *under the minimum requirements adopted by TVA in its rural development program.* (Add. Fdg. 106, R. 699-700; R. 978, 991, 1007, 1016, 1021, 1027, 1035, 1053, 835, 842; Offer to Prove R. 1001.) However, rural business is a comparatively new and gradually growing field; and has been and is assiduously cultivated by the several appellants. (Add. Fdg. 129, R. 709; 937-940; Comp. Ex. 184*.)

E. REVIEW OF THE FACTS RELATING TO THE METHOD OF DISPOSAL OF THE WATER POWER AFTER CONVERSION INTO ELECTRICITY.

(1) The execution of the TVA Unified Plan will establish the United States in the electric utility business with a virtual monopoly throughout the State of Tennessee and large parts of eight neighboring States.

The TVA Unified Plan includes ten high dams and hydro-electric plants [1] (constructed and to be constructed) all of which are, or will be, interconnected by high tension, heavy duty transmission lines so as to create one vast grid system or power pool. They will also be interconnected with Wilson Dam so as to bring into the TVA power pool not only the capacity of Wilson Dam as constructed under the National Defense Act of 1916, but also the increased capacity to be provided at Wilson Dam under the TVA Unified Plan. (R. 2124; Add. Fdg. 107, R. 700; Comp. Ex. 116†, p. 477; Fdgs. 179, 180, R. 640.) This TVA power pool will extend geographically from Hiwassee and Fontana in North Carolina on the *east* to the Mississippi River on the *west,* and from Guntersville and Wheeler in northern Alabama on the *south* to Gilbertsville near the Ohio River and Norris near the boundaries of Kentucky, West Virginia and Virginia on the *north.* (Add. Fdg. 107, R. 700; Comp. Ex. 327*; Def. Exs. 136A*, 137*.) The court excluded as immaterial an official TVA Press Release (Comp. Ex. 834, R. 3763, 3766, excluded), in which the appellees described their power development as follows:

> "The TVA *has under way,* as you know, a comprehensive program for the development of the power resource(s) of the Tennessee River and its tributaries.

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[1] Gilbertsville, Pickwick Landing, Wheeler, Guntersville, Chickamauga, Watts Bar, Coulter Shoals, Norris, Hiwassee and Fontana.

No more ambitious program of hydro-electric development has ever been actually undertaken in this country."

"We *are making provision* for one of the largest hydro-electric developments in the world, with a potential three million horse power available. We are expending, and expect to expend, millions upon millions of dollars in construction activities, *all looking toward the development of more and more power.*"

This grid system or power pool may be tapped at any point so as to draw upon the whole reservoir of power (Add. Fdg. 107, R. 700; Moreland R. 1452; Thomas R. 2125), and consequently the area of potential distribution is much greater than the area of the grid system. In the present state of the art it is commercially feasible to transmit electricity for approximately 250 miles, so that it will be practicable to transmit the electricity to be generated by the TVA to any point within 250 miles of any of the dams included in such electric grid system or power pool. (Add. Fdg. 110, R. 700; Sporn R. 1260; Moreland R. 1452; Dr. A. E. Morgan, Comp. Exs. 109†, p. 187, R. 2641; 114†, p. 525, R. 2685.) While economy would suggest that the electricity should be disposed of as close to the grid system or power pool as possible in so far as the market is able to absorb the power, it is plain that any area within a radius of 250 miles of any such dams is threatened with invasion by TVA so long as any of the TVA power remains unabsorbed. (Moreland R. 1452-3, Offer to Prove, R. 1483-5.)

Even in an extreme low water year, as repeatedly reported to the Congress by the TVA, this hydro-electric system will have a firm capacity of 660,000 kilowatts [1] at 100

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[1] Some of the findings submitted by appellees and signed verbatim by the majority of the trial court (Fdgs. 38, 40, 43, 230, R. 602-3, 650) omit reference to the Fontana project and may be urged as implying that Fontana is not part of the officially announced TVA construction program which because of

(Continued on page 67)

per cent load factor and of 1,100,000 kilowatts at 60 per cent load factor,[1] and will be capable of producing 5,780,000,000 kilowatt-hours of firm energy and 1,880,000,000 kilowatt-hours of secondary energy annually. (Add. Fdgs. 7, 11, 12, 13, 107, R. 672-3, 700; Kurtz R. 1215; Comp. Exs. 328°, p. 62; 115†, p. 279, R. 2697.) In a typical water year this huge federal utility will be capable of producing 10,000,000,000 kilowatt hours of energy per year (Add. Fdg. 14, R. 674; Kurtz R. 1216-17), and the uncontradicted estimate is that there will actually be produced for sale in a typical water year 7,670,000,000 kilowatt-hours of electrical energy. (Moreland R. 1449; Comp. Ex. 509, R. 3350.) This

[1] The typical load factor of large public utilities operating in the area where TVA has commenced and plans to expand its business is 60 per cent. (Kurtz R. 1212; Comp. Ex. 116†, pp. 402, 468, 515, R. 2726A.)

(Continued from page 66)

its very magnitude covers several years and involves the initiation of projects on a staggered construction schedule. The absence of any basis for such a contention is sufficiently shown by the fact that the Fontana project was again included with definite dates for initiation and conclusion of construction in the construction schedule officially reported by TVA to the Congress in the midst of the trial of this suit. (Def. Ex. 153†, p. 948; Add. Fdg. 8, R. 673.)

Another finding similarly submitted by the appellees and signed verbatim by the majority of the court (Fdg. 94, R. 621) purports to set forth the firm power capacity of certain TVA dams (not mentioning Fontana and Gilbertsville) without including the power capacity which will be added to the system by the Fontana and Gilbertsville projects, and without including a part of the power installations which the TVA Unified Plan provides will be added to the power installations that are now under way at other dams. Such computations, standing alone, in a suit to prevent irreparable damage from threatened acts are both insufficient and irrelevant. Except to the extent that such findings do have some relation as representing an admittedly incomplete stage of this federal development, the majority of the trial court failed or refused to make any findings upon the facts stated in this sub-section and essential to the determination of the scope of the enterprise, its effect on the reserved powers of the States and the rights of the people and the extent of the competition with which the appellants are threatened.

is exclusive of steam generating plants now owned or which may be constructed or acquired under the Act. TVA has estimated that the cost of the TVA Unified Plan, excluding Wilson Dam, will be $473,000,000 (Add. Fdg. 15, R. 674; Comp. Ex. 116†, p. 403, R. 2700A), and that the annual gross income from its power operations will be $23,000,000. (Comp. Ex. 115†, p. 279, R. 2697.) The foregoing estimate of cost includes nothing for the huge transmission system which will be necessary to market this power and according to the estimate of Professor Moreland, which was excluded, this would amount to more than $116,000,000. (Comp. Ex. 505, R. 3344, excluded.)

Something of the mammoth size of the enterprise in which the United States is attempting to embark under the statute even when measured by the TVA Unified Plan (which is far less than the sweep of the statute and includes none of the power to be developed at additional sites for which TVA has already requested appropriations for exploratory work) appears from the following facts. In 1936 the total amount of electricity, *both firm and secondary*, generated for public use by public utilities was only a little over 1,000,000,000 kilowatt-hours *in the entire State of Tennessee*, only about 3,700,000,000 kilowatt-hours *in the entire States of Tennessee, Alabama and Mississippi*, and only about 9,300,000,000 kilowatt-hours *in the entire States of Virginia, North Carolina, Georgia, Kentucky, Tennessee, Alabama and Mississippi*,—the seven States of which any part lies in the Tennessee River basin. (Add. Fdg. 108, R. 700; Newton R. 1418-19; Comp. Ex. 486, R. 3329; Moreland R. 1451.) Large parts of five of these seven States lie more than 250 miles from the great electric grid system or power pool which will be created by the TVA Unified Plan, and hence beyond the area of practical distribution of the TVA power. (Comp. Ex. 327*.)

Further, in 1936 the *total sales* of electricity by utilities for consumption within the area lying within 100 miles

of any of the dams included in the TVA power system were only 3,660,000,000 kilowatt-hours. The *total sales* in the same year within the area lying within 150 miles of any of such dams were only 7,160,000,000 kilowatt-hours. (Add. Fdg. 109, R. 700; Comp. Ex. 327*; Moreland R. 1451; Comp. Ex. 499.) These sales in each instance *include both firm and secondary power.*

Something further of the size of the TVA electric system resulting from the TVA Unified Plan appears from the following facts. The present transmission system of the TVA Unified Plan consists of approximately 1500 miles of transmission lines and 69 substations purchased, constructed, under construction or authorized for construction.[1] (Hapgood R. 2146; Def. Ex. 136; Def. Ex. 153†, pp. 987-991; Fdg. 185, R. 641; Add. Fdg. 86, R. 687.) *This, however, is only about 10 per cent of the transmission lines which will be necessary to complete the vast federal electrical system included in the TVA plan.* The testimony is uncontradicted that a transmission system of from 12,000 to 15,000 miles will be required to market the electrical energy which will be produced by the current TVA Unified Plan. (Add. Fdg. 112, R. 701; Moreland[2] R. 1453.) In comparison, the total mileage of transmission lines of the 18 companies, which were parties to this suit at the time of trial, is only approximately 11,000 miles; and this figure includes their transmission lines in large areas lying more than 250 miles from the TVA dams and hence beyond the range of practical transmission. (Moreland R. 1453-4;

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[1] As at October 15, 1937, the total mileage of all kinds of lines purchased, constructed, under construction and authorized for construction by TVA was 4827. (Def. Ex. 136; Fdgs. 170, 174, 175, 179, 183, 187, 188, 194, R. 638-642; Hapgood R. 2160.)

[2] Edward L. Moreland: Senior Member, Jackson & Moreland, Consulting Engineers, Boston and New York; Head of the Electrical Engineering Department of Massachusetts Institute of Technology. (R. 1447-9.)

Comp. Exs. 500, 10, 15, 28, 30, 35, 38, 47, 58, 59, 60, 84, 85, 96, 104; Fdgs. 6-23, R. 585-598.) The total mileage of transmission lines (apart from TVA transmission lines) in the entire State of Tennessee is only a little over 2,000 miles. (Comp. Ex. 500, R. 3333.)

(2) The appellees have adopted and are carrying out a systematic program to take over the markets and businesses of the appellants by direct inducements offered to the consumers of electricity throughout the territory served by appellants.

The first step taken by the appellees to acquire a market for the tremendous pool of power to be developed under the TVA Act was the adoption and announcement, on August 25, 1933, of the TVA Power Policy. This Power Policy was reported to Congress in the First Annual Report of TVA (Comp. Ex. 113°, pp. 22-24, R. 2681-3), and is an administrative interpretation of the act as well as a definite declaration of the purpose of the appellees to engage in the electric power business and to bring about public ownership of distribution facilities for the distribution of TVA power.[1]

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[1] This Power Policy is set forth at length in Comp. Ex. 113° and in Add. Fdg. 90. (R. 688-9.) The trial court excluded, as irrelevant, incompetent and immaterial, an authenticated official TVA Press Release by which this Power Policy and the program for the TVA electric power business was publicized throughout the territory in which appellants operated. (Comp. Ex. 633, excluded, R. 3487.) The trial court subsequently received a resolution of the TVA Board (Def. Ex. 29, R. 4061) purporting to rescind this Power Policy but such resolution or purported rescission was never reported to the Congress nor disclosed to the public until it was offered in the trial of this cause; and the evidence clearly establishes that the program set forth in the Power Policy as originally announced, although not a complete statement of all of the things that TVA has sought to accomplish, has been, and is being aggressively pursued. Nevertheless the trial court, contrary to all of the facts adduced at the trial, found that this Power Policy was never put into effect. (Fdg. 215, R. 647.) For discussion of additional material evidence on this subject excluded by the court, see pp. 219-225, 229-233, *infra*.

Immediately following the announcement of its Power Policy and without any determination of cost factors, which were then indeed unascertainable, on September 14, 1933, the appellees adopted and announced the TVA rate schedules, including a schedule of wholesale rates to be charged municipalities and cooperatives[1] and a system of schedules embodying retail rates to be collected by municipal or cooperative "distributors" and to be incorporated in all contracts made by TVA with such distributors. (Add. Fdg. 111, R. 701; Comp. Ex. 113°, p. 34; Comp. Ex. 634, excluded, R. 3490.) Separate schedules of rates to be collected by such distributors were prescribed by TVA for residential customers, commercial customers and industrial customers.

While the trial court excluded evidence to show that these rate schedules to be charged by TVA distributors were and are between 25 and 60 per cent lower than the comparable rates fixed by the State regulatory bodies in the regulation of the businesses of the appellants (Offers to Prove, R. 949, 972; Comp. Exs. 192, 198, 339, excluded, R. 3002, 3007, 3073), *counsel for the appellees conceded at the trial that TVA rates, in all classes of service, are "substantially lower" than existing rates of any of the appellants.* (Fdgs. 120-123, R. 628; R. 943-4, 946.) The effect, and the manifest purpose, of the adoption and the repeated publication of these rates throughout the Tennessee Valley area long in advance of the construction of the dams, before plans or cost estimates could have been made and even before the number or location of any dams except Norris and Wheeler had been determined, was to promote a general demand for TVA power, to invite and solicit the cus-

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[1] These cooperatives, which are non-profit associations, are sometimes designated as "Electric Membership Corporations" or "Electric Power Associations."

tomers and businesses of appellants and to promote public ownership of local electric facilities.

These schedules of rates to be collected by TVA distributors have been embodied in the TVA contracts,[1] the standard provisions of which were adopted and approved by the directors as early as October 16, 1933. (Comp. Ex. 575, R. 3389.) Such contracts fix the retail price to the consumer. (Add. Fdg. 96, R. 692. See "Resale rates" in any TVA contract, R. 2731.) They are in the nature of franchises granted by TVA to distribute TVA power subject to regulations and restrictions which make the distributing agent a mere bill collector for TVA.[2] They are the type of contract which a manufacturer of a generally advertised product might make with a territorial agent. (For a discussion of the provisions of the contracts, see pp. 206-209, *infra*.) The TVA contracts subsequently made with some of its distributors even go so far as specifically to require TVA to render without compensation accounting, legal and engineering assistance (Comp. Exs. 125-127, 928-930, R. 2857, 2858, 3976, 3981, 3982), and to foster and promote the increased use of electricity within the municipality.[3]

After adopting this Power Policy and the rate schedules and contract provisions, which form the basis of the TVA activities in acquiring the markets served by the appellants, the appellees proceeded to give them the widest

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[1] These contracts are all in evidence. (Comp. Exs. 117-145, 196, 224, R. 2729-2888, 3004, 3026; Def. Exs. 144, 154°.) The terms of the contracts between TVA and municipalities and cooperatives are summarized in Add. Fdgs. 97-100. (R. 693.)

[2] In some instances even this function is performed by TVA under contracts to operate the property. (Comp. Exs. 176-180, R. 2938-50.)

[3] Comp. Ex. 117, contracts with Athens, R. 2732, Muscle Shoals, R. 2741, Pulaski, R. 2741, Amory, R. 2742, Okolona, R. 2749, New Albany, R. 2760; Comp. Exs. 126, R. 2857; 127, R. 2858; 928, R. 3975; 929, R. 3980.

possible publicity. A Publicity Bureau, an official department of the TVA, was created in 1933. (Comp. Ex. 113°, p. 56; Comp. Ex. 364, excluded, pp. 1982, 2022, R. 3101, 3103.) The court excluded evidence showing that through this department TVA has continuously issued "Press Releases" describing its power activities, its rates, the rapid expansion of its generating and transmission system, the acquisition of municipal and other customers, the success of these operations, the advantages of the uses of cheap electric power, the savings to consumers of TVA electricity and the alleged unreasonableness of state-regulated rates of private utilities. The effect of such Press Releases, and it is fair to say the manifest intention of them, has been to destroy the going businesses of the appellants by representing that TVA rates, fixed even without knowledge of TVA costs, constituted fair wholesale and retail rates and that the state-regulated rates of appellants and other privately-owned utilities are exorbitant and excessive.[1] This ruling of the court is discussed at pp. 219-225, *infra*.

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[1] These TVA Press Releases are Comp. Exs., excluded, 633, 634, 779-902 incl., R. 1510, 3673-3925. The TVA power activities are described in Comp. Exs., excluded, 633, 789, 790, 797, 800, 805, 809-11, 824, 845, 861, 884, 780, 786, 802, 807, 808, 816, 817, 820, 823, 825, 827-30, 832, 833, 835-41, 853, 857, 866, 880, 882, 886-89, 892, 902; the TVA rates in Comp. Exs., excluded, 634, 801, 817, 865, 891, 800, 803, 813, 839, 846-8, 859, 863, 873, 883, 901; the rapid expansion of the TVA generating and transmission system in Comp. Exs., excluded, 788, 812-14, 831, 852, 856, 878, 897, 781, 784, 785, 791 806, 849-51, 854, 855, 863, 864, 867, 870, 885, 890, 893, 896, 898-900; the acquisition of municipal and other customers and success of those operations in Comp. Exs., excluded, 790, 796, 821, 826, 874, 875, 881, 794, 804, 818, 819, 858, 869, 871; and the advantages of cheap TVA electricity in Comp. Exs., excluded, 793, 803, 823, 834, 879, 842, 860, 874-6, 891, 894, 901. TVA Press Releases also represent that TVA rates include all legitimate costs and that the state-regulated rates of private utilities are excessive and the result of financial abuses and mismanagement. (Comp. Exs., excluded, 790, 799, 800, 815, 839, 843, 891, 842, 862, 868.)

In addition to this publicity with which appellees have filled the newspapers throughout the entire area and beyond, the appellees have published and widely distributed among customers of appellants illustrated booklets of TVA activities and rates,[1] such as Comp. Ex. 188, R. 2969, and Comp. Exs., excluded, 187°, 189, R. 2977, and 190 R. 2987; have circulated for use at public meetings, without charge, motion picture films illustrating TVA rural electrification activities (Comp. Ex. 918, R. 3936); have prepared and distributed without charge complete sets of blanks to be used in making rural surveys, including forms of application agreements for use of TVA power, (Comp. Ex. 918, R. 3934; and Comp. Exs., excluded, 391, 392 and 393) and as appellants *offered to show*, have prepared material for hundreds of magazine articles, as illustrated by Comp. Ex. 635, excluded, R. 3493-3508.

Appellants further *offered to show* that supplementing these activities, the TVA directors, department heads and other TVA representatives as part of their duties, have made public addresses and radio broadcasts advocating municipal ownership of electric distribution facilities and explaining TVA contracts, rates and sales policies, and have assisted in the organization and promotion of TVA rural cooperative associations. (Add. Fdg. 102, R. 698; see testimony and Offers to Prove, R. 1321-3, 1395-7, 1441-2,

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[1] A fair sample of this is found in a widely distributed advertising pamphlet entitled "TVA Electricity Rates": "*Why TVA Electric Rates Are Low.* The TVA in its electric operations submits to all legitimate charges to which a private utility would be subjected. Its success in making available cheap electricity lies in the cost assumed by some private utilities which TVA does not pay. A few of these may be mentioned: The attempt to pay dividends on the $1,400,000,000 of write-ups exposed by the Federal Trade Commission; expensive campaigns to influence legislation; excessive fees to affiliated engineering and management companies, as well as the tremendous salaries paid to officers of both the holding companies and the operating companies." (Comp. Ex. 189, excluded, R. 2983.)

1327-8, 1324-6, 1358, 1359-60, 1439-40, 1360-1, 1361-2, 1086-8; Comp. Exs., excluded, 390, 817, 879, R. 3173, 3737, 3867.) These activities have constituted a continuous and systematic campaign. All testimony with reference to these activities was excluded by the trial court in a ruling which is discussed at pp. 229-233, *infra.*

In the promotion of their electric power business in rural areas the appellees, in many instances, have made surveys and constructed and operated distribution lines, the customers being later organized into a membership corporation to take over the title to such property and to purchase power under a standard TVA power contract. (Fdg. 134; R. 630.) In other instances purely dummy corporations have been organized by bringing so-called promoters to the TVA offices to execute contracts previously prepared. (R. 1338-9, 1344; Offer to Prove, R. 1356.) The methods employed by TVA in promoting its rural electrification development are described in its publication "The Neighborhood Plan." (Comp. Ex. 918, R. 3934.) As a result of these methods, at the time of trial TVA had contracts with eighteen membership corporations operating over 2700 miles of rural lines all of which with a few minor exceptions were constructed by TVA, the entire cost being provided from TVA funds or funds borrowed from Rural Electrification Administration,[1] (hereinafter referred to as REA). In some instances Civil Works Administration (hereinafter referred to as CWA) furnished labor for the construction of lines. (Comp. Ex. 570, R. 3382.) In all cases TVA supervises the financial, bookkeeping and engi-

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[1] For TVA financing of lines see Fdg. 194, R. 642; Fdg. 133, R. 630; Comp. Exs. 162-175 inclusive, R. 2895-2938; Def. Ex. 136, Table E, R. 4184A; for construction of lines with REA funds see Comp. Exs. 523, R. 3359; 529, R. 3360; 536, R. 3364; 537, R. 3365; 538, R. 3366; 540, R. 3367; 543, R. 3368; 545, R. 3370; 546, R. 3371; 549, R. 3372; R. 1518, 1519; 408, R. 2328; 385, excluded, R. 3158.

neering operations of such membership corporations. (Add. Fdg. 103, R. 699; Comp. Exs. 398-406 incl., R. 3201-3238.)

In the industrial field no standard rate was or has been adopted for industrial consumers such as Monsanto Chemical Company, the Aluminum Company of America, Victor Chemical Company, and other like customers with which TVA has since made long term contracts. (Comp. Ex. 118, R. 2828; Def. Ex. 154°, pp. 309, 313, 192, 302, 315.) Contracts of that type are apparently made upon the basis of whatever is necessary to take the business away from privately-owned utilities.[1]

(3) TVA has procured the cooperation and assistance of PWA and REA in financing and promoting the TVA Power Program.

The trial court made no findings on this subject. In the execution of the TVA Power Program, TVA has utilized

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[1] Something of the character of this competition is illustrated in the case of the Monsanto Chemical Company, which is now being supplied by TVA. The Monsanto Chemical Company purchased its power requirements for its phosphoric acid operations from appellant, the Alabama Power Company, the revenue from which business amounted to $387,000 per year. (R. 956.) Upon the removal of the phosphoric acid operations of such Company to Columbia, Tennessee, appellant, The Tennessee Electric Power Company, entered into negotiations with Monsanto Chemical Company to furnish it with 50,000 kilowatts of power at its Tennessee plant. After the terms of the proposed contract had been agreed upon and The Tennessee Electric Power Company had offered to secure performance by depositing $1,500,000 of its First Mortgage Bonds, the Monsanto Company declined to execute the contract (Willkie R. 1503-4; Add. Fdg. 117, R. 704) in a telegram which stated:

> "*Due to the unfortunate competitive conditions surrounding The Tennessee Electric Power Company,* our directors are unwilling to hazard a several million dollar investment whose success is entirely dependent upon the continuity of its power supply *at contract rates which we believe are insecure* without a guarantee from the Commonwealth & Southern." (Comp. Ex. 628, R. 3477.)

other agencies of the Federal Government. (Add. Fdg. 135, R. 711.) The aggregate amount which the Federal Government has contributed or agreed to contribute through the Public Works Administration (herein referred to as PWA), to municipalities for the construction of competing systems *to distribute TVA power* amounts to $13,995,883 of which $7,721,314 *represents an outright gift or subsidy.* (Def. Ex. 153†, p. 1009; Comp. Ex. 484, R. 3323, 3327.) Of all the cities having power contracts with TVA, which prior to the advent of TVA were served by one or another of the appellant companies, only two have not received financial aid from PWA, and those two were cities which already owned their distribution systems and purchased power at wholesale from one of the appellants.[1] *The TVA contracts with municipalities require the municipality to use all reasonable diligence in acquiring a distribution system by construction or purchase.* (Add. Fdg. 97, Sec. (b), R. 693; See "Acquisition of System" in any contract, R. 2803.)

At the time of the trial there were twelve other cities in Alabama, Mississippi and Tennessee, all being served by one or another of the appellant companies, which had voted to acquire municipal distribution systems for distribution of TVA power and for that purpose had been granted loans and gifts by PWA. (Add. Fdg. 114, R. 702; Comp. Ex. 484, R. 3322.) Although TVA lists no contracts with any of these twelve cities, obviously PWA had received assurances from TVA which it regarded as sufficient basis for making these loans and grants. PWA announced that these loans and grants were made for the construction of distribution systems to distribute TVA power; and the projects include no generating facilities. (Comp. Exs. 484, R. 3322;

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[1] Add. Fdg. 114, R. 701-2; Comp. Ex. 484. R. 3322; Fdg. 205, R. 645; Comp. Exs. 420, R. 3251; 422, R. 3270; 427, R. 3276; 438, R. 3283; 441, R. 3286; 460, R. 3305; 471, R. 3314, 473, R. 3315; 475, R. 3315; 478, R. 3316; and 466, excluded, R. 3312.

485†.) In the case of Bessemer and Tarrant City, Alabama, PWA, acting in cooperation with TVA, refused to approve their applications to include a steam generating plant in the municipal projects and required these cities to eliminate generating facilities from their projects and take TVA power as a condition of obtaining the federal loan and grant. (Comp. Exs. 442, 444, 449, R. 3286, 3290, 3300; Comp. Ex. 446, excluded, R. 3295.)

The aggregate amount which the Federal Government through REA has loaned or agreed to lend to non-profit membership corporations for distribution systems *for use of TVA power* at the date of the trial exceeded $1,400,000.[1] Director Lilienthal in the Hearings on the Second Deficiency Appropriation Bill for 1937 (Comp. Ex. 116†, p. 485, R. 2720) stated: "*We have a very cooperative arrangement with REA* by which they are furnishing by far the bulk of the financing through this area." (See also Dr. A. E. Morgan, Comp. Ex. 116†, p. 614; Add. Fdg. 135, R. 711.)

Appellants in addition *offered to prove* by correspondence between TVA, PWA and REA and by PWA and REA press releases and other documentary evidence[2] that the activities of these federal agencies in assisting in the development of a market for TVA power were an integral part of a definite National Power Policy to promote municipal ownership and regulate the electric utility industry, and the ruling of the trial court in excluding such proof is discussed at pp. 233-235, *infra*.

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[1] Comp. Exs. 536, R. 3364; 537, R. 3365; 538, R. 3366; 540, R. 3367; 543, R. 3368; 545, R. 3370; 546, R. 3371; 549, R. 3372; 550, R. 3372; 551, R. 3373; 552, R. 3374; and 565, R. 3378.

[2] R. 1402-8, 1515-16; Comp. Exs., excluded, 418, R. 3246; 428, R. 3276; 429, R. 3278; 446-450 incl., R. 3295-3301; 461-465 incl., R. 3305-3312; 469, R. 3314; 480-83, R. 3316-21; 637-648 incl., R. 3509-3554; 683-685 incl., R. 3599-3605; 385, R. 3158; 770-773 incl., R. 3659-3663; 776-778 incl., R. 3667-3673.

The alliance and cooperation between TVA, PWA and REA, disclosed by this evidence, represent a concentration of federal support to the promotion of public ownership, the federal control and regulation of electric power operations, the promotion of the power business of TVA and the destruction of the businesses of the appellants.

(4) In executing their Power Program, the appellees have contracted to sell and are now offering for sale electric power and electric service at rates far below the actual cost.

The trial court made no findings on this subject and excluded as immaterial the appellants' offer to prove that without capitalizing operating losses and deficits during the period of construction and business development, and assuming the sale of all the power to be produced by TVA under the TVA Unified Plan at TVA rates, the TVA "yardstick rates" will result in an annual operating deficit of more than $9,000,000 without taking into consideration either the cost of, or the revenue derived from, power produced at Wilson Dam at its maximum capacity as constructed under the National Defense Act of 1916.[1] (See Moreland, Offer to Prove, R. 1463-70 and statistical data in Comp. Exs. 504, 505, 506, excluded, R. 3343-3347.) This operating deficit amounts to approximately 39% of the

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[1] This loss is based upon actual out-of-pocket expense and does not take into consideration the subsidies and advantages such as substantial immunity from taxation, use of franking privileges and use of Government credit. No figures are available for the extent of many of these omissions from the "yardstick rates" which would be necessary to make them comparable to utility operation, but appellants offered to prove that the items for which figures are available would increase the annual operating loss to $19,516,000. The loans or gifts of federal funds by PWA and REA to wholesale contractors for the distribution of TVA power are likewise not considered. (Comp. Ex. 506, excluded, R. 3346 and Moreland, Offer to Prove, R. 1463-70.)

ultimate maximum annual revenue, which means that nearly 30% of the actual cost of every kilowatt-hour of power sold must be paid for by taxation and not by the consumers. For a discussion of the relevency of this evidence and its exclusion by the trial court, see pages 236-237, *infra.*

Whether purposeful or inadvertent, the effect of this is to accelerate the establishment and expansion of the TVA power business, the establishment of the policies and purposes of the TVA Act and the elimination of appellants from the field.

(5) Under the TVA Unified Plan, TVA will regulate its own rates, the rates of distributors of TVA power and all other local intrastate electric rates, including those of appellants.

TVA regulates and fixes its own rates. (Add. Fdg. 132, R. 710; Comp. Exs. 322-325; see also Conclusion 40, R. 661; and pp. 163-164, *infra.*) It also regulates the retail rates of distributors of TVA power for terms of 20 to 30 years. (See "Terms of contract," "Resale rates" and "Schedules of rates" in any TVA contract with its distributors, R. 2731; 2733-5; 2751-5; Add. Fdgs. 96, 97(e), 100(e), R. 692, 693, 697; Fdgs. 121, 221, R. 628, 648; also pp. 204-209, *infra.*) One finding of the majority of the trial court, in the nature of a conclusion of law, seems to imply a view that the fixing and control of retail rates by TVA over periods of from 20 to 30 years (in accordance with the TVA Act) through a system of contracts, is not a regulation of such rates. (Fdg. 222, R. 649; cf. Conclusion 45, R. 661.) However, that these retail rates are fixed and controlled by TVA is plain on the face of the contracts. The regulation of such rates is discussed at pages 163-175, *infra.*

However, the purpose and effect of the TVA Unified Plan is not limited to the regulation of local electric rates of distributors of TVA power but, like the TVA Act, is

designed to regulate, and in fact will regulate, the local electric rates of other utilities, including the appellants.[1] Under the TVA Unified Plan, TVA will, *in an extreme low water year,* generate for sale more than twice as much electricity, and *in an average water year* nearly three times as much electricity, as was sold in 1936 by utilities in the entire area lying within 100 miles of any of the dams included in the TVA power system. *In an extreme low water year,* it will generate for sale substantially more electricity than was sold by all utilities in 1936 w thin an area lying within 150 miles of any of such dams. (See pp. 66-69, *supra.*) This electricity will be offered for sale at rates "substantially below" the state-regulated rates of appellants in this limited market now adequately served. (Moreland R. 1451-3; Fdgs. 116-119, R. 627-8.)

While the trial court excluded as immaterial evidence offered through experts in the operation of utilities that the operation of the TVA Unified Plan will in fact regulate the rates of the appellants (Offers to Prove, Lefferson R. 1412-16; Newton R. 1419-22; Stanley R. 949-50), the uncontroverted facts above stated show that the appellants will be forced to fix their rates at the level established from time to time by TVA. (Opinion R. 555; Ford R. 1127;

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[1] This is in strict conformity with the appellees' interpretation of the TVA Act. This interpretation of the Act and purpose of the TVA Unified Plan has been repeatedly stated by the appellees in official Press Releases, excluded by the trial court as immaterial. Thus in an official TVA Press Release, the appellees stated in the words of Director Lilienthal: *"The power policy written into the Tennessee Valley Authority Act represents an attempt to regulate public utilities not by quasi-judicial commissions, but by competition."* (Comp. Ex. 815, excluded, R. 3732.) For similar interpretations of the Act by the appellees and statements of their purpose in administering the Act, see Comp. Ex. 799, R. 3698; Comp. Ex. 796, R. 3691; Comp. Ex. 800, R. 3703; Comp. Ex. 790, R. 3683, all similarly excluded. Also see *TVA Directors' Minutes,* Comp. Ex. 708, excluded, R. 3640.

see pp. 163-175, 237, *infra*.) However, the trial court declined to make any finding of fact on this point, although requested to do so by appellants (Proposed Fdg. X E 20, R. 462), excluded competent and relevant evidence on the subject (see pp. 236-237, *infra*) and then concluded as a matter of law that there will be no regulation of the rates or businesses of the appellants or of other private utilities. (Conclusion 40, R. 661.)

(6) The execution of the TVA Unified Plan will supersede the State regulation of local electric rates and service.

The only findings of the trial court which in any way bear upon this issue are Nos. 26 and 27 (R. 599) which, so far as relevant, sustain the statement in the title of this subsection. (R. 559.)

As to regulation of rates: In previous sections it has been pointed out that, under the operation of the TVA Unified Plan, TVA will regulate its own rates, the rates of distributors of TVA power and the rates of other utilities, including appellants, operating in the States through which the huge TVA electric power system will extend. (See pp. 80-82, *supra*.)[1] Thus State regulation of local intrastate electric rates will be displaced by TVA regulation of such rates.

As to extensions of service: In the States of Tennessee, Alabama, and other States in which one or another of

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[1] The trial court excluded as irrelevant evidence that TVA has expressly denied the power of a State to exercise any control over any of its rates or rate policies. This evidence consisted of a written statement filed with the Alabama Public Service Commission and signed by all three directors of TVA, in which TVA declined to submit for examination its cost books and records and stated: "*And since your Commission cannot directly determine the rates and rate policies of this national agency, it should not try to do this indirectly, by calling for testimony concerning matters clearly beyond your control.*" (Comp. Ex. 884, R. 3880-1, excluded.)

the appellant companies are now operating, the State Commissions have adopted regulations applicable to such appellants fixing the minimum requirements under which they may be compelled to construct line extensions to give service in areas not theretofore served. (Add. Fdg. 131, R. 710; Comp. Ex. 185, R. 2961; R. 835; 939; 972.) As pointed out at pages 88-89, *infra*, the result of actual and threatened competition by TVA is that privately owned public utilities in this area are unable to borrow money at reasonable interest rates, if at all, either for the purpose of refunding existing obligations or for the purpose of constructing new facilities to improve or extend existing service. This means the nullification in fact of State power to require or compel service extensions and plant additions or improvements. (Add. Fdg. 133,[1] R. 710.)

As to quality and continuity of service: The operation of the electric power businesses of the appellants has involved (and still involves) the development of new markets and the extension of service throughout the areas in which they have the right and the duty to serve under State franchises. (Add. Fdgs. 124-129, R. 708-9; Stanley R. 934-941; Comp. Exs. 182,* 183,* 184*; R. 772, 788.) This has required, on the part of each of the appellants, constant study of system planning, regular surveys of possible line extensions, promotion of new industries, continuous service to industrial, commercial and domestic consumers, promotion of electric power demand by sales of electric appliances, study and instruction in new uses for electric power by all classes of consumers, and necessarily an understanding of

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[1] "The competitive activities of TVA in making it impossible for the complainant companies to reduce their fixed charges through refinancing and in making it impossible for them to procure new capital *interfere with and limit the power* of the State regulatory bodies to require the complainant companies to reduce their rates and extend or improve their facilities and service."

the local conditions in the territory being served.[1] The performance of all of these functions requires the development and maintenance of a large and efficient organization. These functions have been carried on under State supervision and have contributed to the economic growth and development of the States themselves.

The elimination of these functions is an inescapable consequence of the facts stated at pp. 86-89, *infra*. As there pointed out, the City of Knoxville *was* only a part of the market served by the Tennessee Public Service Company. The City of Memphis is only a part of the market served by the Memphis Power & Light Company. The City of Chattanooga is only a part of the market served by The Tennessee Electric Power Company. The execution of the TVA Unified Plan will not only take away the markets embraced within the artificial boundaries of these cities, which are the load centers and focal points of electric power distribution in the surrounding areas, but will require the appellants to reduce their rates to the level of the TVA subsidized rates in the areas which appellants continue to serve. Whether this will result in a complete breakdown of service in these surrounding areas not receiving TVA power depends upon whether any of the individual appellants can continue to operate under such conditions, and since the trial court declined to receive any evidence as to the subsidized character of the TVA rates (Moreland R. 1463-6; Comp. Exs. 504-506, R. 3343-7)

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[1] Necessity for system planning. (Add. Fdg. 129, R. 709.) Regular surveys of possible line extensions. (Add. Fdg. 127, R. 709; R. 938, 976, 989, 1026, 1033, 1051, 1005, 1015, 1020.) Promotion of new industries. (Add. Fdg. 125, R. 708; R. 935, 773, 788; Comp. Ex. 182*.) Continuity of service. (Fdg. 116, R. 627.) Promotion of electric power demand. (R. 937-8, Comp. Ex. 183*.) Instruction in new uses for electric power. (R. 937-8.) Necessity for understanding local conditions. (R. 971.) The testimony of the Alabama Power Co. on these points was accepted by the trial court as typical of all the appellants. (R. 936, 965, 972.)

or as to the *extent* of the damages with which appellants are imminently threatened (Moreland R. 1480-5; Lefferson R. 1416-7; Newton R. 1424; Comp. Exs. 512-14, R. 3354-6), the trial court could not properly make any determination of that question. However, the undisputed facts appearing in the record establish that the execution of the TVA Unified Plan will seriously undermine, if not destroy, the ability of the States to enforce the obligation to render electric service, which state-regulated agencies must assume as a condition to their right to engage in the business at all, and will thus destroy the ability of the States to protect the economic needs of their citizens who have become dependent upon such service. (Add. Fdg. 134,[1] R. 710.)

The evidence hereinbefore reviewed shows that if anything remains of State regulation of the electric power business after the completion of the TVA Power Program, irrespective of the survival of some portions of the businesses now conducted by the appellants, it will be a small and degenerate vestige of the powers reserved to the States and the people under our Federal Constitution.

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[1] "The carrying out of the Tennessee Valley Program to take over the business and markets now served by the complainant companies will necessarily, in the case of such complainant companies whose business and markets are so taken, destroy their ability to maintain the organizations which they have developed, their ability to perform the functions which they have heretofore and which they are now performing in providing adequate electric power service, and will destroy the ability of the States and political subdivisions in which such complainant companies are now operating to regulate and control the electric power rates and service in such areas or to protect the economic needs represented by industrial, commercial, and domestic electric consumers who are now being served by such complainant companies." (R. 710.)

F. THE EXECUTION OF THE TVA UNIFIED PLAN IMMINENTLY THREATENS EACH OF THE APPELLANTS WITH IRREPARABLE DAMAGE.

The trial court found that each of the appellants is threatened with substantial irreparable damage through the execution of the TVA Unified Plan.[1] (Fdg. 125; R. 628; Opinion R. 555.) The TVA Unified Plan will generate for sale in an extreme low water year twice as much power as was sold in 1936 by all utilities within the area lying within 100 miles of any of the dams included in the TVA power system and in an average water year substantially more than the total amount of power which was sold in 1936 by all utilities within the area lying within 150 miles of any of such dams. (See pp. 66-69, *supra.*) This power will be offered for sale at rates "substantially below" appellants' rates and in such a manner as to promote the statutory policy of having the local electric business carried on by public and non-profit organizations. The service or market area of each of the appellants lies wholly, or in large part, within the territory lying within 150 miles of the dams included in the TVA power system. (See pp. 61-64, *supra.*) The appellants are thereby threatened with the loss of their businesses and markets.

The TVA transmission lines, even as constructed to date, substantially duplicate the transmission facilities of the appellants in the State of Tennessee and are designed so that they may be readily extended to all of the principal load centers in the areas served by appellants. (See Maps, Comp. Exs. 333A,* 335A,* 332A,* 334*; Add. Fdg. 113, R. 701; R. 1103-1106.) The distribution lines already built

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[1] In relation to damages Fdgs. 184, 186, 248, and 249, are bare conclusions not supported by underlying findings of essential facts or by evidence, and Fdgs. 106, 111, 151, 203-12, 216, 239-42 are based on an erroneous conception of law. (See pp. 199-201, *infra.*)

and serving TVA power have been constructed in the immediate vicinity of load centers now being served by appellants. (See Maps, Comp. Exs. 332-A,* 199,* 205*-210,* 326*; Add. Fdg. 122, R. 707.) These lines, all of which could be served by appellants without substantial changes in, or additions to, their present facilities (Add. Fdg. 119, R. 706; R. 1007, 1017, 1022, 1027, 1035, 1053, 978, 992), substantially restrict the normal growth of appellants' businesses and substantially impair the value of appellants' facilities designed and built to permit extension of service to new customers and territories at low increment cost as rapidly as the new business could be secured or the extensions of service justified. (Add. Fdg. 122, R. 707; R. 1109; 1007; 1022; 1027-8.) This duplication of appellants' facilities will increase as the TVA Unified Plan advances toward completion and causes and threatens loss of value of appellants' facilities.

The appellants are also threatened with great losses through TVA regulation of their rates. The trial court excluded evidence that the damage from loss of revenue which would result from TVA rate regulation, after making allowance for assumed increased customer consumption resulting from rate reductions, would exceed $21,000,000 per year. (Moreland, Offer to Prove, R. 1484; Comp. Ex. 514, excluded, R. 1127.)

At the present time TVA *is serving* six cities formerly served by one or another of the appellants. It has entered into *contracts to serve* seven other cities *which are now being served* by one or another of the appellants. (Add. Fdg. 114, R. 702; Def. Ex. 143, R. 4192.) It has *applications for service* from forty-one additional cities *which are now being served* by one or another of the appellants. (Add. Fdg. 115, R. 703-4; Comp. Ex. 116†, pp. 537-8.) In addition to these there are twenty-one cities which have

voted to acquire or construct municipal distribution systems to distribute TVA power. (Add. Fdg. 114, R. 702; Comp. Exs. 116†, pp. 536-7; 335A*, 191, R. 3001; R. 991, 795, 978, 804.) It also has contracts with eighteen "membership corporations" operating over 2700 miles of rural lines. (Add. Fdg. 92, R. 691.) Approximately 75% of appellants' businesses consists of industrial sales, and TVA already is serving many industrials, including some of the largest industrial consumers in the area. Manifestly, the loss of these markets will take away a very substantial part of the total gross income of the several appellants.

TVA has already entered into contracts to serve practically the entire territory of Memphis Power & Light Company. (R. 1126; Comp. Ex. 118, R. 2807-8; Fdg. 210, R. 646; Add. Fdg. 114, R. 702.) [1] TVA has entered into a contract to serve Chattanooga, which is the heart of the system of The Tennessee Electric Power Company and constitutes about 35 per cent of its load. (Comp. Ex. 129, R. 2859; R. 1106, 769.) TVA has entered into a contract to serve the city of Jackson which is the heart of the system of the West Tennessee Power & Light Company. (R. 480; Comp. Ex. 133, R. 2873.) Each of these appellants is obviously threatened with ultimate bankruptcy. (R. 1127.)

The testimony is uncontradicted that the threat of injury and destruction from TVA competition has caused great financial losses to each of the appellants, excepting Appalachian Electric Power Company, through inability to refinance outstanding securities at lower interest rates and

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[1] At the time of trial TVA also had entered into a contract (Comp. Ex. 118, R. 2808) with Knoxville to serve practically the entire service area of Tennessee Public Service Company; and since this appeal was taken, this company has turned over its electric facilities to TVA, and its nominee, the City of Knoxville.

through inability to finance extensions at reasonable rates, if at all. (Add. Fdg. 123, R. 707-8; Frothingham [1] R. 1307-1310, 1319-20.)

G. THE DECISION OF THE TRIAL COURT.

The trial court in its opinion repeatedly states or implies that the Bill is based in whole or in part upon a charge of fraud. (R. 542.) With the possible exception of the misrepresentations charged to have been made by appellees in their efforts to further the TVA power business in competition with appellants, the Bill raises no question of fraud, unless it can be said that a charge that federal officers or agents are acting under an unconstitutional statute or in excess of statutory authority is a charge of fraud. If that be so, all constitutional cases are fraud cases.

The holdings of the trial court upon the issues, *as conceived and stated by it,* are:

First: That all of the acts of the appellees are authorized by the statute. In this holding the court ignores the only points on which appellants contended the appellees had exceeded the scope of the statute. (Cf. Opinion R. 555-8 and Point IV, pp. 224-225, 233-235, 236-237, *infra.*)

Second: That all of the appellants are threatened with future irreparable damage and that the constitutionality of the TVA Act must be determined. (Opinion R. 555.)

Third: That the water power will be constitutionally created. (Opinion R. 558-562.) This holding is based upon a misconception of the applicable law and upon a failure

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[1] Francis E. Frothingham, then President of the Investment Bankers Association of America, with wide experience in the investment banking business. (R. 1304.) The trial court excluded as irrelevant other testimony showing this type of damage which was offered through Walter M. Robinson, an investment banker of Nashville, Tennessee, and Harry M. Addinsell, an investment banker of wide reputation and head of the First Boston Corporation. (See pp. 237-238, *infra.*)

to consider, or make any findings upon, essential facts. (See pp. 20-21, 37-38, *supra* and Point I, pp. 94-133, *infra.*)

Fourth: That the method of disposal of the water power is valid. (Opinion R. 562-5.) This holding also is based upon an erroneous conception of law and upon a failure to consider, or make any findings upon, essential facts. (See p. 143, *infra,* pp. 79, 82, *supra,* and Point II, pp. 133-190, *infra.*) The error is further aggravated by the holding that a citizen suffering irreparable injury from the operation of a federal statute regulating matters of intrastate concern may not challenge the act but that the act may only be challenged by a State. (Opinion R. 563.)

Fifth: That the charge of confederation between appellees and PWA has not been established. (Opinion R. 552-3.) The court made no findings on this subject. This result was reached by denying appellants the benefit of subpoena and the right to take depositions to prove the charge and by excluding, as immaterial, all evidence which the court recognized as bearing on the issue and by ignoring all pertinent evidence in the record. (See pp. 233-235, *infra.*) The court also failed to apprehend that the matters involved in this paragraph, as well as in paragraphs "*First*" and "*Fourth,*" were material and relevant as bearing upon the extent and imminence of the threat with which appellants are confronted and upon the steps which have been and are being taken to establish and place in operation the purposes and policies of the TVA Act and of the TVA Unified Plan.

Sixth: That the evidence does not establish that appellees have acted to force the sale of distribution systems of appellants at distress prices on threat of duplication with federal funds. (Opinion R. 544, 551.) Laying to one side the circumstance that this charge related to acts done in confederation with PWA and other federal agencies, the court's conclusion was reached by the simple process of

denying appellants the right of subpoena and the right to take depositions to support the charge (see pp. 216-217, 233-235, 238-240, *infra*) and of adopting the novel legal theory that a charge of threatened irreparable damage can only be established by proof that the damage has already been inflicted and the alleged wrong consummated. (Opinion R. 551-2.)

Seventh: That there is no proof of coercion of municipalities or cooperatives by TVA to take TVA power. (Opinion R. 553-4.) While the confederation between TVA and PWA did include the exercise of coercion on Bessemer and Tarrant City, Alabama, (evidence of which was ignored by the court), the court here misconceived or misstated the charge which was that appellees, in soliciting appellants' customers, had engaged in an aggressive campaign of soliciting municipalities and organizing cooperatives to use TVA power and of promoting the statutory policy of having the local electric business carried on by public or non-profit organizations. (See pp. 70-75, *supra*, 175-178, *infra*.) The court also excluded most of the evidence offered on this point, as immaterial (see pp. 229-233, 219-225, *infra*), but the record does nevertheless sustain the charge.

The trial court delivered its opinion several days before it filed an order purporting to adopt certain requested findings and conclusions by reference (R. 542, 566) and more than four weeks before it filed any formal findings and conclusions. (R. 542, 583.) Findings Nos. 1 to 28, describing the properties and businesses of appellants, were agreed upon between the parties. The majority of the trial court adopted (in nearly every instance verbatim) all the findings and conclusions submitted by appellees with the exception of Def. Proposed Fdg. 28 and Proposed Conclusions 62-64.[1] (R. 566, 490, 541.) The court required oral

[1] Cf. Order of January 25, 1938, R. 566, Fdgs. 29-251, R. 600-655 and Conclusions 1-62, R. 655-664, with appellees' Requested Findings and Conclusions, R. 477-541.

argument immediately after the close of the testimony and required that suggested conclusions and findings and all briefs should be submitted at the close of such argument (R. 1862, 1919, 2281-4, 2316, 2370-3), so that the appellants were precluded from commenting upon such findings or conclusions either in brief or oral argument. (Cf. *Morgan v. United States*, 304 U. S. 1.) These findings and conclusions are erroneous in the respects pointed out at appropriate places in the Statement of the Case and in the Argument. Judge Gore refused to adopt the conclusions of law submitted by appellees and made many additional findings of fact upon material issues upon which the majority had either failed or refused to make any finding. (R. 669-713.)

SPECIFICATION OF ERRORS.

Appellants urge each of the assigned errors[1] Nos. 1-42, 45-135, inclusive. (R. 715-759.) Without waiving or limiting any of said Assignments, more particularly the trial court erred:

1. In finding, concluding and decreeing that the water power being created and to be created by TVA is being and will be constitutionally created, and in failing to find, conclude and decree that such water power will not be created either as an incident to the exercise of the power to regulate interstate commerce or of the war or national defense power. (Assignments of Error 68-80, 104-113; see Point I, *infra*.)

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[1] Assignments of Error Nos. 1-42, 45-67, inclusive, relate to errors in procedure and rulings on evidence. Many of the other Assignments relate to findings and conclusions which are deemed plainly immaterial or inapplicable and have been assigned and are preserved to avoid any technical question should any of them be claimed to amount to material findings or conclusions by implication.

2. In finding, concluding and decreeing that the method of disposing of the water power being created and to be created by TVA, both as provided in the TVA Act and as being carried out by the appellees, is valid, and in failing to find, conclude and decree that both the statutory and the administrative method of disposing of such water power is in excess of the powers of the Federal Government and in violation of the Fifth, Ninth and Tenth Amendments. (Assignments of Error 81-107, 112, 114-125, 129, 131, 133, 134; see Point II, *infra.*)

3. In finding, concluding and decreeing that the appellants are not entitled to sue to enjoin the acts complained of in the Bill. (Assignments of Error 91, 92, 98-103, 105b, 105c, 125-134; see Point III, *infra.*)

4. In failing and refusing to receive evidence upon, or to consider or decide the questions (a) whether the sale of electric power by appellees at rates below the cost of production, distribution and sale is prohibited by the TVA Act; (b) whether under the TVA Act the appellees are authorized to confederate with other federal agencies to take over the business of the appellants or to force appellants to sell their electric systems at distress prices on threat of having the value of such facilities destroyed by duplications through loans and gifts of federal funds; and (c) whether the TVA Act, properly construed, authorizes the appellees to engage in a systematic campaign of misrepresentation for the purpose, and with the necessary effect, of destroying and appropriating the going businesses of the appellants. (Assignments of Error 104, 105, 107, 117; see Point IV, *infra.*)

5. In numerous rulings on matters of evidence, matters of procedure and in the conduct of the trial which deprived appellants of a full and fair trial and constituted a denial to appellants of due process of law as a matter of

procedure. (Assignments of Error 1 to 42, 45 to 67; see Point IV, *infra.*)

6. In entering its final decree dismissing the Bill of Complaint and in failing to find, conclude and decree that the appellants are entitled to the relief prayed for in said Bill. (Assignment of Error 135.)

SUMMARY OF ARGUMENT.

In view of the detailed nature of the Index of Argument at the beginning of this brief, it is believed that a Summary of Argument is not necessary.

ARGUMENT.

POINT I.

THE WATER POWER BEING CREATED AND TO BE CREATED BY TVA IS NOT BEING, AND WILL NOT BE, CONSTITUTIONALLY CREATED, SO THAT THE FEDERAL GOVERNMENT (TVA) WILL ACQUIRE NO TITLE TO SUCH WATER POWER.

Appellees concede that TVA or the Federal Government may not legally produce or acquire title to the electricity except in so far as such electricity[1] is produced in the exercise of some constitutional power of the Federal Government. The principle was stated by this Court in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, as follows:

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[1] While the words "electricity" and "electric power" are sometimes used in this Section for brevity and convenience, the property with which we here deal, is not electricity but mechanical energy which is created by impounding water behind dams and which is generally known as raw water power. We do not here raise any question as to the manufacture of the raw water power or mechanical energy into electricity when and if it has been constitutionally created and has constitutionally become the property of the United States.

"* * * And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such (electrical) energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States." (loc. cit. 340.)

But the appellees seek to justify the creation of the electricity upon the grounds:

(a) That it is brought into being as an incidental result of an exercise of the power to regulate interstate commerce (Article I, Sec. 8, Clause 3); and

(b) That it is brought into being as an incidental result of an exercise of the war or national defense powers. (Article I, Sec. 8, Clauses 11, 12, 13, 14, 15 and 16.)

The appellants contend under the facts of this case, not only that the production of the electricity may not be justified upon either of the foregoing grounds, but also that the power scheme falls before the principle that Congress may not "in the execution of its powers, adopt measures which are prohibited by the Constitution," and may not "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government." *McCulloch v. Maryland,* 4 Wheat. 316, 423; *Linder v. United States,* 268 U. S. 5, 17; *United States v. Butler,* 297 U. S. 1.

A.

The electricity will not be produced as an incident to the exercise of the power to regulate interstate commerce.

The generation of electric power constitutes no part of interstate commerce. *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 179-182; *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F. (2d) 515, 524, affirmed 286 U. S. 525. Even apart from that consideration, there

is no contention that the power to regulate interstate commerce authorizes the United States to engage in any business merely because it is an interstate business. Thus, Congress has power to reach every subject of taxation, but "Congress cannot authorize a trade or business within a State in order to tax it." *License Tax Cases*, 72 U. S. (5 Wall.) 462, 471. The appellees' contention is—(1) that under the power to regulate interstate commerce the Federal Government has the implied power (a) to construct navigation facilities and to improve the navigable capacity of interstate navigable streams, and (b) to engage in the construction of works for flood control; and (2) that the power here in controversy comes into being as the incidental result of the exercise of one or both of these powers. We examine these contentions in the order stated.

1. The electricity will not be brought into being as the incidental result of an exercise of the implied power of the Federal Government to improve interstate navigable streams for navigation.

While commerce includes navigation (*Gibbons v. Ogden*, 9 Wheat. 1), the power to create interstate navigable waterways and to improve interstate navigable streams for navigation is *implied* from the power to regulate interstate commerce. Navigable waters and the soils under them belong exclusively to the States, subject only to the rights surrendered to the Federal Government under the Constitution. *Martin v. Waddell*, 16 Pet. 367, 410; *Shiveley v. Bowlby*, 152 U. S. 1, 15. The United States has no title or property right in the navigable streams or the lands over which they flow (*Port of Seattle v. Oregon & W. R. R. Co.*, 255 U. S. 56, 63; *United States v. Utah*, 283 U. S. 64; *Kansas v. Colorado*, 206 U. S. 46; *United States v. Cress*, 243 U. S. 316); and every property right of riparian owners on navigable streams is created by and flows exclusively

from State sovereignty. *United States v. Cress, supra; Packer v. Bird,* 137 U. S. 661; *Port of Seattle v. Oregon & W. R. R. Co., supra.* It is settled that the United States in general has no power to engage in the business of generating electricity. *United States v. Chandler-Dunbar Co.,* 229 U. S. 53, 73; *Ashwander v. Tennessee Valley Authority, supra*; *Alabama Power Co. v. Gulf Power Co.,* 283 Fed. 606, 613; *Missouri ex rel. Camden v. Union Electric Light & Power Co.,* 42 F. (2d) 692, 695.

"The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation." *Port of Seattle v. Oregon & W. R. R. Co.,* 255 U. S. 56, 63. See also *Appleby v. New York,* 271 U. S. 364, 381, 402; *Scott v. Lattig,* 227 U. S. 229, 242-3. Any legislation ostensibly for the control or improvement of navigable waters which has no real or substantial relation to such control or improvement is unconstitutional and void. *United States v. River Rouge Improvement Co.,* 269 U. S. 411, 419; *Wisconsin v. Illinois,* 278 U. S. 367, 415.

In order that electricity may constitutionally "come into being in the exercise" of the power to make navigation improvements, it must be *incidentally* and *necessarily* produced by the works constructed for navigation and those works must be reasonably appropriate for, and have a real and substantial relation to, the improvement of navigation. In *United States v. Chandler-Dunbar Co.,* 229 U. S. 53, this Court said:

> "If the *primary* purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government." (loc. cit. 73.)

This Court then, in explanation and support of its ruling, quoted with approval from *Kaukauna Water Co. v. Green Bay Co.,* 142 U. S. 254. In the *Kaukauna* case this Court

said, even with reference to a dam built pursuant to the more extensive State authority:

> "* * * if, in the erection of a public dam for a recognized public purpose, there is *necessarily* produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an *incident* of its right to make such improvement." (loc. cit. 273.)

But in that case this Court condemned the creation of "a wholly unnecessary excess of water" and confined its approval to "cases where the *surplus*[1] is a mere incident to the public improvement." (loc. cit. 275.)

It therefore follows that where large and costly additions are made to, or superimposed upon, constitutional structures, which additions serve no useful or consequential purpose of the constitutional objective but are plainly and directly adapted to create, and do create, large quantities of water power that would not otherwise be created, such additions to, or enlargements of, the constitutional structures are plainly in excess of federal power. Even more plainly, separate structures, which do not directly or consequentially serve or promote the improvement of navigation but are related to the constitutional objective only by the circumstances of embodiment in a single statutory or administrative scheme and which directly and plainly are adapted to create, and do create, large quantities of

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[1] "Surplus power" means the difference between the amount of power incidentally created by the navigation structure and the amount of power used for operation of navigation facilities or other government uses. It does not mean the difference between the amount of power used for operation of navigation facilities or other government uses and the maximum amount of power which could be developed from the stream by a project directed wholly, or in part, specially to the development of the power resources of the stream.

power, are beyond federal constitutional power. The real, substantial and *bona fide* relation to navigation improvement is lacking. *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419; *Wisconsin v. Illinois*, 278 U. S. 367, 415. *In both cases there is not merely a forbidden exercise of federal power, but a complete absence of federal power.*

This conclusion is reenforced by the settled rule that the interstate commerce power, from which power to improve navigable streams is implied, may not be extended so as to control matters reserved to the States or the people upon the basis of indirect, remote or insubstantial relationships between the things sought to be controlled and interstate commerce. *Schechter Corp. v. United States*, 295 U. S. 495, 546; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36-37; Dissenting opinion of Cardozo, *J.*, in *Carter v. Carter Coal Co.*, 298 U. S. 238, 327-8. While in the situations stated in the previous paragraph relationship between the structure and improvement of navigation is entirely lacking, this rule makes plain that an indirect, remote or inconsequential relation to the improvement of navigation would not supply constitutional power for the construction of such a structure. Federal power may not be extended on such a slender basis into the concerns of the State with the practical effect of vesting in the Federal Government the ownership of the power resources of the rivers of the States, the right to engage in the intrastate business of generating electric power, the right and power to oust the States' police power over such a local business, the power to deprive the States of tax resources arising out of such local business, the power to deprive the States of their right to determine when and how their natural resources shall be developed subject only to the paramount right of the United States to control the waters of their navigable

streams *for navigation alone*, or the power to destroy the right of the citizens of those States to engage in that business, subject only to State regulation. Otherwise, in a large and important field, this implied power "would absorb or imperil the powers reserved to the States" and the people.

Our inquiry is, therefore, confined to the question whether the creation of the raw water power (which is later manufactured into electricity) will be the *incidental* and *necessary* result of the operation of structures which have a real, substantial and *bona fide* relation to the improvement of the Tennessee River for navigation. *Kaukauna Co. v. Green Bay Co.*, 142 U. S. 254, 273; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Ashwander v. Tennessee Valley Authority, supra.*

To be incidental to a navigation improvement, the raw water power must come into being through the operation of structures having a real, substantial and *bona fide* relation to the achievement of the constitutional purpose or objective. When additional structures are superimposed upon the navigation structures, when the navigation structures are greatly enlarged or when entirely separate structures are built, not for the purpose of carrying out the constitutional objective but to create the raw water power which would not otherwise be developed, then the creation of that power ceases to be incidental to the constitutional objective and becomes, depending upon the relative magnitude of the power development and the constitutional objective, either the primary purpose of the scheme or at least a separate and independent objective. In either case the scheme is outside the field of federal power. Obviously, where the production of power is the primary purpose, the whole scheme falls. Whether the whole scheme falls in the case where the production of power is merely an independent objective must depend upon whether the power

project is so intermingled with the navigation project that it cannot be extricated and leave the scheme effective to achieve the constitutional purpose.[1] *Retirement Board v. Alton Railroad Co.*, 295 U. S. 330, 362; *Carter v. Carter Coal Co.*, 298 U. S. 238, 312; *The Employers' Liability Cases*, 207 U. S. 463, 501.

We now consider the questions, *first*, whether the *power project authorized in the TVA Act* is incidental to navigation improvement; *second*, whether the *power project included in the TVA Unified Plan*, considered as a whole, is incidental to navigation improvement; *third*, whether in any event the *power to be produced by the tributary dams* included in the TVA Unified Plan is incidental to navigation improvement; and *fourth*, whether the statutory and administrative plans do not also plainly attempt to exercise power not granted but forbidden to the Federal Government in the guise of exercising an implied power to improve streams for navigation.

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[1] The appellees rely upon the rule that a constitutional project or structure is not rendered invalid because it also serves another purpose and perhaps one outside the field of federal power. *Arizona v. California*, 283 U. S. 423. That rule is subject to at least two limitations,—*First*, the rule applies only where there has been no enlargement of the project or structure beyond the scope of the constitutional objective, and no construction of additional structures outside the constitutional objective and related to it only by the circumstance of embodiment in a single scheme. Where, as here, the works or project has been enlarged and supplemented by additional structures beyond the scope of the constitutional objective, *the scheme may not be saved by inverting the principle invoked and asserting that the scheme is valid because, although exceeding constitutional power, it has elements which also serve constitutional objectives. Second*, the rule may not be pressed to the point where it permits Congress to exercise power not delegated but forbidden to it by the Constitution. The decision of this Court in *Arizona v. California* obviously may not be construed as in any way conflicting with these principles; for if that decision were susceptible of such a construction, then it would be to that extent in conflict with settled principles of constitutional law and with a long line of decisions of this Court running up to and including *Ashwander v. Tennessee Valley Authority, supra.*

(a) That power development is an independent, if not the primary, purpose of the TVA Act, is plain on the face of the Act.

In our analysis of the statute (pp. 12-14, *supra*) we have set forth with particularity many of the numerous provisions which, in our view, conclusively establish that on the very face of the Act the development of the power resources of the Tennessee River and its tributaries is not incidental to navigation improvement, but that the development of such power is at least an independent and separate, if not controlling, objective of the statute. TVA may condemn lands for the construction of "dams, reservoirs, transmission lines, power houses and other structures * * * at any point along the Tennessee River or any of its tributaries." (Sec. 4(i).) The Authority has "power to acquire or construct power houses, power structures, transmission lines, navigation projects and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. (Sec. 4 (j).) The tributary projects, as shown by the extensive directions with reference to Norris Dam, are to be constructed "so that the maximum amount of primary power may be developed" at all other dams downstream. (Sec. 17.) TVA may issue bonds on the credit of the United States for the construction of steam electric generating plants or any other facilities for the generation or transmission of power. (Sec. 15.) The President is required from time to time to recommend such further legislation to Congress, if any, as he deems proper "to carry out the general purposes" stated in the Act, and "for the *especial purpose* of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said *general purposes*" among other things, the "*maximum generation of electric power* consistent with flood control and navigation." (Sec. 23.) When power development

is merely incidental to navigation improvement, no statutory admonition about its development is necessary—it follows as the shadow follows the substance; and when the statute admonishes the agency created not only to develop the power resources of the river system, but to develop them in such a way as to develop the maximum power resources of that system, the statute has passed far beyond the field of federal power.

The appellees take nothing by asserting that the statute contains declarations that the power shall be developed in recognition of the paramount rights of navigation. If any private corporation undertook the maximum development of the power resources of the Tennessee basin, it would, as a matter of course, have to develop them in recognition of the paramount rights of navigation. But it would not follow, nor does it follow in the case of TVA under the statute, that the private company would be, or that TVA is, engaged in making a navigation improvement with an incidental power development. The point, misstated by the appellees and misconceived by the court below,[1] is not whether the statute went so far as to say that TVA should develop the maximum power resources of the Tennessee basin *in disregard of* the rights of navigation on the Tennessee River *but whether the statute did direct the TVA to develop the power resources on the Tennessee River and its tributaries.* The statute says upon its face that what-

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[1] The trial court stated the issue on this point to be whether the generation of power was "inconsistent" with navigation. (Opinion R. 545.) If inconsistency, that is, conflict, were the test rather than whether the creation of energy is the "incidental" result of the operation of *bona fide* structures for the improvement of navigation, there would be no limit to the power of the Federal Government to engage in the manufacture of electricity so long as the federal power project did not actually obstruct navigation. In other words, the Federal Government would have the same power to engage in the manufacture of electricity as any private power company.

ever Congress intended to do with respect to navigation, and whatever Congress intended to do with respect to flood control, *it also definitely intended deliberately, separately, and purposefully to develop the power resources of the Tennessee River and its tributaries.*[1]

The legislative history confirms the face of the Act in this respect. The project adopted by Congress in the Rivers and Harbors Act of July 3, 1930, for the improvement of the Tennessee River for navigation from its mouth to Knoxville, provided for a 9-foot channel with 3 feet overdepths at critical points and locks 110 x 600 feet throughout. The channel and lock dimensions provided by this Act conformed to the channel and lock dimensions in the navigation improvements completed and in process of execution on the upper Mississippi, the Ohio, the Missouri, the Illinois, the Kanawha and, in general, the principal rivers of the great Mississippi inland waterway system. (See p. 26, *supra.*) When Congress adopted the TVA Act on May 18, 1933, to provide for the development of the power resources of the Tennessee basin, Congress did not by that

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[1] The trial court apparently thought that even though the statute requires the maximum development of the power resources of the Tennessee River and its tributaries, the statutory declaration (added in the Amendments of 1935) that the power project should be operated in subordination to the paramount rights of navigation (just as in the case of any private power project on a navigable stream), made the creation of the power incidental by legislative fiat. (Opinion R. 560.) Not only was this a complete misconstruction of the statutory language, as shown above, but it was an erroneous conception or application of the law on statutory declarations and findings. Both legislative declarations of purpose and legislative findings of fact must fall before the truth. It is plain that this must be so. Where, as in so many cases involving constitutional rights, finality of fact is finality of law, it is obvious that any principle which permitted legislative recitals or findings to be given controlling weight other than in cases where the fact remained in doubt upon the evidence in the record would eventually destroy the constitutional function of the courts. *Crowell v.*

(Continued on page 105)

Act adopt any navigation project for the improvement of the Tennessee.

Indeed, prior to the amendments of 1935 (which were adopted at the instance of TVA and, we think it is fair to say, in an attempt to provide protective coloring for its power development in the light of its experience in the *Ashwander* case), the TVA Act did not even require TVA incidentally to create a navigation channel of any particular depth, width or size of locks wherever it substituted a large power pool for one or more navigation pools contemplated by the Federal Navigation Project. TVA could have provided an incidental navigation channel with controlling depths of 3 feet, 6 feet, or 9 feet, with any minimum width and with locks only large enough for pleasure launches; and no one could have said that TVA had thereby violated the statute. And even the amendment of 1935 only brought into the statute *a single requirement* with reference to the navigation channel incidentally to be provided in connection with the development of the

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Benson, 285 U. S. 22; *Minnesota v. Barber*, 136 U. S. 313, 319; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 708. The determination of constitutional rights of citizens would be transferred to the legislative branch. Individuals and minorities would be powerless to defend their constitutional rights against legislative usurpation. This principle is especially important under the modern legislative practice of incorporating by legislative fiat purported findings of ultimate facts. In *Mugler v. Kansas*, 123 U. S. 623, 661, this Court said:

> "• • • *The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.* If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

power resources of the Tennessee River and its tributaries —that was a requirement that the incidental channel should be 9 feet (Sec. 4(j))—but there was no requirement with reference to widths, size and number of locks, or any other essentials of a navigable channel. This should be compared with the standard practice on federal navigation projects whereby these matters are specified in detail in the official War Department Report which is incorporated in the Rivers and Harbors Act by reference as a definition of the project adopted. On the other hand, the TVA Act did not entrust the operation of the incidental navigation facilities to TVA, but left their operation with the Corps of Engineers just as in the case of any private power development. (Secs. 7(a), 5(k).)

(b) Considering the TVA Unified Plan as a whole, it is plain that it is a power project and that the water power created is in no sense the incidental result of a navigation improvement on the Tennessee River.

In general either the Federal Navigation Project or the incidental navigation facilities to be provided in connection with the TVA power project will result in a 9-foot channel from the mouth of the Tennessee River to its head at Knoxville. However, a review of the facts shows that the structures embodied in the TVA Unified Plan are *entirely different in physical characteristics and purpose* from those in the Federal Navigation Project; that, apart from certain incidental and relatively minor navigation facilities *without which the TVA Unified Plan would completely bar through navigation,* the TVA structures are *plainly, directly and solely adapted to the creation of a vast amount of power* and are unnecessary and useless, if not actually detrimental, from the standpoint of navigation; that the incidental navigation facilities have been included in the TVA Unified Plan merely to replace the navigation channel of the Fed-

eral Navigation Project which is flooded out and destroyed by the TVA power project;[1] that the only relation between the TVA power structures on the main stream and the incidental navigation facilities provided on that stream is that the latter are necessary to preserve navigation which would otherwise be barred by the TVA power structures; that, stated most favorably to the appellees, *the TVA main stream structures* are power structures with some incidental navigation facilities and not navigation structures which incidentally create water power; and that the TVA tributary projects are related to navigation only by the circumstance of embodiment in a single statutory and administrative scheme and consequently are devoid of any relation to navigation improvement. (See pp. 22-36, *supra.*)

In short, these TVA structures have no real or substantial relation to the improvement of navigation. *Wisconsin v. Illinois,* 278 U. S. 367, 415, 418; *United States v. River Rouge Improvement Co.,* 269 U. S. 411, 419. Plainly therefore, these TVA structures are wholly outside the field of federal power. There is not merely an illegal exercise of federal power but a complete absence of that power.

To hold otherwise would be to overturn the established principle that the Federal Government may not create or acquire water power except as it comes into being in the operation of structures reasonably adapted, and having a real and substantial relation, to the improvement of navigation[2] and lay down the antagonistic principle that the

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[1] This is the precise requirement which the Rivers & Harbors Act of July 3, 1930, adopting the Federal Navigation Project for the Tennessee River, *imposed upon private interests, States or municipalities which might desire to undertake the construction of any of the power projects which are now being built by TVA.*

[2] This discussion deals specifically with the power to improve navigable streams. The same principle, of course, applies to constitutional structures built in the exercise of any other federal power. This discussion also deals with the creation of water power and not its conversion into electricity.

Federal Government may build any structures it chooses for the creation of water power so long as the power scheme includes some incidental facilities either to improve, or overcome obstructions created by the power project to, navigation. The right of the Federal Government to develop water power would thus be made coextensive with, but dominant over, the power of a State or a private power company to develop water power. This seems to have been the view of the trial court. (See footnote, p. 103, *supra.*)

The Federal Navigation Project would produce no commercial power. The TVA Unified Plan is designed to create and will create the largest hydro-electric system in the United States, if not in the world, with a capacity nearly as large as the total quantity of electricity generated by utilities in 1936 in the seven States any part of which lies within the Tennessee drainage basin. (See pp. 65-69, *supra.*)

There is no rational explanation of the fact that the TVA Unified Plan will cost approximately $473,000,000, (which is six and three-tenths times as much as, or approximately $400,000,000 in excess of, the cost of the Federal Navigation Project), except that the TVA Unified Plan is a vast power project while the Federal Navigation Project is a navigation improvement. This additional sum is so "grossly disproportionate" to the cost of the Federal Navigation Project and to any justifiable expenditure for the benefit of navigation (see pp. 28-29, *supra*), that the conclusion must be that the purpose is to promote some other result (*United States v. Constantine*, 296 U. S. 287, 289); and since this vast additional expenditure is for structures which are plainly adapted to, and do, produce a vast quantity of water power which would not otherwise be created, it is equally plain that that other result is power development.

This circumstance can not be explained on the ground that the TVA Unified Plan provides any superior naviga-

tion facilities. (See testimony of General Pillsbury before Congressional Committee, pp. 35-36, *supra.*) In the substantial and important characteristics of an inland waterway, such as capacity for carrying commerce, controlling depths, integration with the great Mississippi inland waterway system, cost or economic justification, prompt provision of a continuous 9-foot channel, duration of open river navigation, and adaptedness of structures to navigation and safety, the Federal Navigation Project is superior to the channel which will be incidentally provided in connection with the power project known as the TVA Unified Plan. (See pp. 22-31, *supra.*)

Other variations between the channel of the Federal Navigation Project and the incidental TVA channel are only in minor details which will offset each other so that (disregarding the superiority of the Federal Navigation Project in the foregoing consequential characteristics) there is no practical difference between them from the standpoint of practical navigation. (Putnam R. 1160, 1168; Kelly R. 1374; see Pillsbury pp. 35-36, *supra.*) Some of appellees' claims with respect to advantages of the TVA incidental channel in these minor details are without basis in fact. Others are offset by corresponding or more serious disadvantages. All are merely incidental results of maximum power development and not the result of any provision made for the benefit of navigation. As disclosed by the review of the facts, the balance is in favor of the Federal Navigation Project even in relation to these minor details, but in any event, such differences between the two channels are without significance from the standpoint of practical navigation even if they were not far outweighed by the superiority of the Federal Navigation Project channel in the consequential characteristics of an inland waterway. (See pp. 31-36, *supra.*)

We deal here with the question whether there exists a factual basis for the exercise of federal power and hence in the matter of finding the facts we are drawing the line between the federal power and the powers reserved to the States and the people and the rights retained by the people. When the determination of facts involves a delineation of the rights of the States and of the United States under our dual system of government, the findings of fact must be based upon substantial rather than fanciful, negligible or inconsequential things; and the power of the Federal Government is not to be extended and the reserved rights of the States and the people curtailed on the basis of negligible or inconsequential things. *Leovy v. United States*, 177 U. S. 621, 623; *United States v. Doughton*, 62 F. (2d) 936, 938.

Just as the interstate commerce power may not in other aspects be extended so as to control matters reserved to the States upon the basis of indirect, remote or inconsequential relationships between the things sought to be controlled and interstate commerce (*Schechter Corp. v. United States*, 295 U. S. 495; Dissenting opinion of Cardozo, *J.* in *Carter v. Carter Coal Co.*, 298 U. S. 238, at 327-8; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Steward Machine Co. v. Davis*, 301 U. S. 548), even more certainly the implied power to improve interstate navigable streams may not be extended on the basis of facts of inconsequential and negligible character,[1] strained inferences or attenuated relations of fact in order that the Federal Government may acquire water power. Otherwise, federal power may be indefinitely extended by a chain of progressive inferences which have lost all relation to the principal fact from which, as a center, the prog-

[1] Thus it would seem plain that Congress could not forbid farmers to cut their wood lots, tile a boggy meadow or cultivate their fields on the theory that such actions might in some degree affect the flow of navigable streams.

ress started with consequent destruction of all constitutional limitations.

Manifestly, when all of the claims of the appellees are put together, the alleged relationship between the creation of the water power and the improvement of navigation are non-existent or too attenuated and insubstantial to form a basis for the extension of federal power into a field of State sovereignty. The details upon which appellees rely are in fact not even remote incidents of a navigation improvement but merely remote incidents of a power project. There is, we submit, a complete absence of federal power to construct the power project known as the TVA Unified Plan.

(c) In any event the water power created by the tributary reservoirs in the TVA Unified Plan is not incidental to the improvement of navigation.

More than five-sixths of the water power to be created by the TVA Unified Plan is to be created by use of the tributary reservoirs. This includes the power created at the sites of the tributary reservoirs and the increase in firm power which the tributary reservoirs create at downstream plants. These tributary reservoirs are Norris, Hiwassee and Fontana. These tributary dams range in height from 265 to 450 feet. None of them has, or will have, any navigation facilities and there is no navigation on the tributaries where they have been or are to be constructed. With the completion of either the Federal Navigation Project or the navigation facilities which will be incidentally constructed in connection with the power project known as the TVA Unified Plan, these tributary reservoirs will contribute nothing to navigation on the Tennessee as *the low water flow of that river is more than sufficient to supply all requirements of navigation without the aid of low water releases; and the effect of such tributary reservoirs on navigation, if any, will*

be unfavorable. (See pp. 24-26, *supra.*) There can be no respectable pretense that these tributary projects have any real, substantial or bona fide relation to the improvement of navigation.

Some contention was made by the appellees that the increase in low water flow expected to be provided by the tributary reservoirs (which is the normal function of a power reservoir)[1] would increase the hydraulic gradient or backwater curve in the TVA lakes on the main stream with the result of slightly increasing the depths at the heads of such lakes.[2] However, *if the appellees are constructing their power projects so as properly to provide an incidental navigation channel,* as we believe they are, there will be no need for any artificial enrichment of flow to maintain adequate depths at the upper ends of the lakes. In fact there is no such need; and the only practical result of such increased flow is to increase the velocities at the heads of the lakes, the effect of which, if any, is unfavorable to navigation. (See p. 34, *supra.*)

But *if the appellees are not constructing their power project so as to provide an adequate incidental navigation channel,* then the suggestion comes to this: Normally the project depths in the few hundred yards of channel lead-

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[1] On this point, as on so many others, the appellees' witnesses took conflicting positions, depending upon which best served for the moment. Thus, in their efforts to build up flood control storage on the TVA main stream dams, appellees' witnesses used a flat pool which would mean no flow whatever, and hence no backwater curve. (Bowman R. 1727, 1730, 1733-4.)

[2] The court in its opinion states: "Norris Dam was built and is being operated to create extra head of water power at Wilson Dam." (R. 559.) This, while accurate, is only a half truth, for Norris Dam, as well as other tributary dams, was built and is being used to create additional firm power capacity at all high dams down stream. This, of course, is not, as the court says, through increase of head, which is negligible, but through increase of low water flow with consequent marked increase of firm or commercial power capacity.

ing to the locks at the upper ends of pools would be secured by excavation, at a cost of a few thousand dollars. However, if this contention were valid, the simple expedient of adopting a disingenuous plan to secure the last one or two feet of this depth by constructing three huge power reservoirs many miles away on the tributaries at a cost of approximately $120,000,000, may be made to serve to bring the construction of such huge power developments on the tributaries within the field of federal power as the incidental result of a navigation improvement. The mere statement of the proposition would seem to carry its own refutation. Where the means to the end are so irrational or pretensive that, in an unnatural, indirect, abnormal and excessively expensive fashion, they merely tend in some negligible degree to forward or promote a constitutional purpose in a manner and at a cost irreconcilable with reason or common sense (but do overwhelmingly, plainly and directly serve to forward an objective which is outside the constitutional power and which objective affords the only rational explanation of the means adopted or justification for the cost incurred), it will not do to say that such a course lies within the field of Congressional discretion as to choice of means. That would extend the federal power without any practical limits.

The only relation of these tributary dams to navigation suggested by the court in its opinion (R. 550) is that *temporarily*, during the construction period and owing to the order of construction adopted by TVA in the interests of speedy power development, releases of impounded water from the tributary reservoirs during a low water season will somewhat, but inadequately, increase the depths in the portions of the Tennessee River where TVA has as yet done nothing. These low water releases would be comparable to the low water releases of any power reservoir; they would not produce the project depths; and they would, of

course, be an incident of the operation of the TVA power system except in so far and so long as the TVA may not be able to wrest markets away from the appellants fast enough to keep pace with its rapidly expanding power system.[1]

Laying to one side the fact that the Federal Navigation Project could have been entirely completed before this time at a cost less than that of Norris and Wheeler Dams alone, and that TVA construction on the tributaries and at Wheeler and Pickwick has been dictated by a desire for speedy power development with consequent delay in providing even an incidental navigation channel (see pp. 29-31, *supra*), this contention, most broadly stated, would mean that the relation of these great tributary power projects to navigation consists of a temporary, insubstantial and inadequate benefit to an inconsequential commerce merely during a construction period.[2] (See Construction Schedule submitted by TVA to Congress in its report of March 31, 1936; Comp. Ex. 328°, p. 27, and at the recent Hearings be-

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[1] Even though long reaches of the Tennessee River remain wholly unimproved after five years of TVA operation and even though the TVA system is yet so underloaded as to make regulation of flow for power purposes relatively unimportant, the record of the operations of Norris Dam in the only year of its operation before the trial below, show daily and weekly fluctuations in flow and week-end and holiday shutdowns of flow, which are characteristic of operations for power production, but which are of no benefit, and may be detrimental, to navigation. (Woodward R. 1814, Barker R. 1994-5; Comp. Ex. 916.)

[2] The trifling character of this claim of even a *temporary* benefit to navigation is shown by the testimony of appellees' witness Woodward R. 1796-7. (See pp. 25-26, *supra*.) More than half of the traffic on the Tennessee River in 1935 and 1936 (the last years for which statistics were available at the time of trial) consisted of materials moved by TVA for its construction. (Alldredge R. 2071-2.) Over 80 per cent of the non-TVA traffic on the Tennessee River consists of short local movements of sand and gravel at several points on the river, which movements are independent of any improvement on the Tennessee River. (Putnam R. 1161, 1163; Comp. Exs. 344*, 345*; Alldredge R. 2072.)

for the House Committee, Def. Ex. 153°, p. 948.) There is no pretense that there would be any practical effect on the unnavigable conditions existing between Knoxville and Chattanooga.

To suggest that such an inconsequential and transient matter could bring these great power developments within the field of federal power, take away from the States control over their resources, remove the conduct of such a business from the field of State police power, and deprive the citizens of the State of the right to exercise their property rights and to carry on a local State business, subject only to State regulation, would seem quite to outrun the bounds of common sense.

(d) Both the statutory scheme and the administrative plan are plainly attempts, in the guise of exercising the implied power to improve streams for navigation, to exercise power not granted but forbidden to the Federal Government.

In the previous subsections of Point I, we have dealt with the circumstances that, under the TVA Act and under the TVA Unified Plan, the water power will not be created by the operation of structures built for the improvement of navigation so that there is a complete absence of federal power in the premises. But both the Act and the administrative plan also fall under the condemnation of another constitutional principle.

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of exerting powers which have been granted to the United States. This principle has been frequently stated by this Court.

In *McCulloch v. Maryland*, 4 Wheat. 316, the Court said:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." (Loc. cit. 423.)

In *Linder v. United States*, 268 U. S. 5, this Court stated the principle as follows:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." (Loc. cit. 17.)

The foregoing principle is to be applied in the light of the great canon of construction laid down in *McCulloch v. Maryland, supra*:

> "Let the end be *legitimate*, let it be within the scope of the constitution, and all means which are appropriate, *which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution*, are constitutional." (Loc. cit. 421.)

These principles apply to the exercise of an express power, and they should be applied even more rigorously where, as here, the alleged basis of federal action is the exercise of an *implied* power. Here it is plain that the end is not legitimate, that the means sought to be employed are prohibited, and that neither is consistent with the letter or the spirit of the Constitution. No realistic reading of the TVA Act, no realistic examination of the TVA Unified Plan, can result in any other conclusion than that the de-

liberate and purposeful creation of a great power development is the primary end and purpose sought to be achieved by both. "To a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed." *Carter v. Carter Coal Co., supra,* 291. The creation of a great federal corporation for the purpose of developing the maximum power resources of the Tennessee River and its tributaries, just as the development of such power resources might have been undertaken by private interests, States or municipalities under the Rivers & Harbors Act of July 3, 1930, is an admission on the face of the Act that the maximum development of the power resources of the Tennessee River and its tributaries would not result from the mere improvement of the Tennessee River for navigation and that such objective can be achieved only by the adoption of plans and structures specially selected, located and adapted to the development of power.

Pursuant to the statutory purpose, the structures of the TVA Unified Plan are plainly and directly adapted to, and do accomplish, the maximum development of the power resources of the Tennessee River and its tributaries within the scope of the execution of the statute embodied in that plan which is merely a current construction program. While creating no superior navigation facilities, the TVA structures involve an expenditure six and three-tenths times as great as the cost of an equivalent, if not superior, navigation improvement—and in lump sum approximately $400,000,000 more than an equivalent or superior navigation improvement. No rational explanation of the selection, design, location and order of construction of these structures and of this vast additional expenditure appears except the adaptedness of such structures to power development and the fact that they will create the greatest hydroelectric power system in the United States, if not in the

world, whereas structures having a real and *bona fide* adaptedness to navigation improvement would produce no commercial power. These TVA structures include great tributary reservoirs, creating five-sixths of the water power, with dams ranging from 265 to 450 feet in height, located far from any navigation facilities and regardless of location, plainly and directly adapted to power development but wholly unsuited to, and indeed destructive of, navigation improvement even if the tributaries were susceptible of practical navigation. To say that the adoption of such a scheme falls within the power of Congress to select the means to an end would be plainly untenable. It is plain that the only end toward which these means are directed and for which they have any real or rational adaptedness, is electric power development—a subject outside the field of federal constitutional power. Any claim that the means have any real or substantial relation to the improvement of navigation is irreconcilable with reason, common sense or intellectual honesty. Their adoption is rationally explicable only upon the basis that the end is to promote the unconstitutional objective of a purposeful power development in the guise of exercising a constitutional power.

These conclusions inescapably follow from a reading of the provisions of the Act and an examination of the structures, nature and purposes of the TVA Unified Plan. (See pp. 12-14, 17-20, *supra.*) They are confirmed by the opinion of a distinguished officer of the Corps of Engineers, the traditional guardians of the preservation and improvement of the navigable waters of the United States, and by the admissions of the appellees themselves. Thus General Pillsbury, in his testimony before a Committee of the Congress, said of the TVA dams:

> "The high dams are very much more costly than low ones. They are not better for navigation but the

justification for their large expenditure can be found only in the power that they make available." (Comp. Ex. 365†, p. 302.)

Dr. Morgan, testifying before a Committee of the Congress as Chairman of the Tennessee Valley Authority, in response to an inquiry whether the purpose of the Tennessee Valley Authority dams is not the production of electrical energy, said:

"That is the major purpose." (Comp. Ex. 112†, p. 262, R. 2674.)

Numerous other statements of like tenor are found in the various Congressional Hearings on TVA appropriations. (Comp. Exs. 108†, p. 25, R. 2621-2; 112†, p. 287, R. 2680.) In an official TVA press release made public late in 1933 (excluded by the court as immaterial)[1] the appellees said:

"If we admit that the use of electricity can not be increased manyfold; if that is our mental attitude, then we must be logical and immediately stop construction of the Cove Creek (Norris) Dam and of the Joe Wheeler Dam." (Comp. Ex. 800, excluded, R. 3706.)

The appellees have never explained why they thought the construction of dams *now* alleged to have been constructed for the *improvement of navigation should be stopped because of an absence of a market for electric power.*[2]

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[1] The error of the trial court in excluding the official Press Releases referred to in this subpoint is discussed at pp. 219-225, *infra.*

[2] In other official TVA Press Releases made public in 1934 (likewise excluded by the court as immaterial) the appellees stated:

"*The Norris Dam is being built for power development,* but that is not an end in itself. • • • It is only a means to an end. The object of building a dam is to provide power; the object of providing power is to raise economic and social conditions of a region." (Comp. Ex. 863, excluded, R. 3829.)

"*The TVA has under way, as you know, a comprehensive program for the development of the power resources of the*

(Continued on page 120)

Indeed, every man in the street and every man in the countryside throughout the nation knows that TVA is primarily a power development. As Mr. Chief Justice Taft said in the *Child Labor Tax Case*, 259 U. S. 20, 37;

> "All others can see and understand this. How can we properly shut our minds to it?"

And in the language of Mr. Justice Field in *Ho Ah Kow v. Nunan*, 12 Fed. Case No. 6546, at 255:

> "* * * we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know as Judges what we see as men * * *."

Otherwise our great constitutional questions will be decided upon the basis of solemn pretenses which every man in the street knows are at war with the facts, upon a kind of feigned issue; and respect for the law, for the courts and for our constitutional system, as well as the interest of public morals and public welfare, will gravely suffer. That would leave a wide field in which individuals and minorities could depend only upon the cold comfort of the ballot box for the protection of many constitutional rights and the maintenance of our dual system of government against the tyranny of political majorities or of those temporarily in power. In practical effect we would then have a constitution decreeing the rights of minorities and individuals and the separation of State and federal power under our dual system of government with no effective means of vindicating those rights.

Tennessee River and its tributaries. No more ambitious program of hydro-electric development has ever been actually undertaken in this country." (Comp. Ex. 834, excluded, R. 3763.)

Many similar statements of appellees are found in other official Press Releases excluded by the court (Comp. Exs. 796, R. 3689; 834, R. 3766; 786, R. 3679; 790, R. 3682; 815, R. 3732; 844, R. 3800.)

We respectfully submit that the facts in regard to the TVA Unified Plan *conclusively and indisputably* show exactly that *pretended* exercise of federal power, in fact outside the field of federal power, which has been uniformly condemned by this Court.

(c) The trial court failed to find or consider the controlling issue of fact and applied an erroneous principle of law.

Neither in the opinion nor in their findings do the majority of the trial court touch the controlling questions of fact and law on this issue. Nowhere do they recognize that the question is whether the water power is to be created as the incidental result of the operation of structures which have a real, substantial and *bona fide* relation to the improvement of navigation. The trial court apparently deemed the controlling question to be whether a federal power development is *"inconsistent"* with navigation or, in effect, whether it obstructs navigation, and that under the euphonious title of a "multiple purpose project" the Federal Government may yoke together constitutional and unconstitutional enterprises. (Opinion, R. 545, 549.) But the constitutional limitations upon the power of the Federal Government to create water power may not be thus escaped.

If by "multiple purpose project" is meant a structure which has a real, substantial and *bona fide* relation to the improvement of navigation, but in its operation necessarily creates some water power, then the TVA projects are not "multiple purpose projects." The facts hereinbefore reviewed disclose that the TVA structures on the main stream are power developments with merely incidental navigation facilities. (See pp. 20-36, *supra.*) The tributary projects are built at locations far removed from any navigation facilities and are completely devoid of relation to navigation improvement.

If by "multiple purpose project" is meant a single statutory or administrative scheme which includes a navigation project or improvement and also a separate power project or development, then such a scheme is beyond federal constitutional power. Thus defined the expression "multiple purpose" is not synonymous with "incidental result." It is the same as though the United States were to assert the right to construct a commercial office building, a department store or factory, and to engage in any business for which the structures were suitable, by making provision for a post office in one corner of the premises. The Federal Government can not escape constitutional limitations by yoking together an unconstitutional structure or objective with a constitutional structure or objective. In such cases, either the whole scheme falls or the unconstitutional structure or objective must be eliminated. *Retirement Board v. Alton R. Co.*, 295 U. S. 330, 362; *Carter v. Carter Coal Co.*, 298 U. S. 238, 312; *Employers' Liability Cases*, 207 U. S. 463, 501.

2. The creation of the water power may not be sustained under any constitutional power of the Federal Government over flood control.

The decision of this point does not require, and therefore under the decisions of this Court does not permit, a determination of the scope of federal power in the matter of flood control; for the facts clearly establish that none of the commercial water power will be created by the operation of flood control structures. *This consideration is conclusive upon this point.*

(a) None of the commercial water power is created by the operation of any flood control structures included in the TVA Unified Plan.

TRIBUTARY RESERVOIRS. The three tributary reservoirs, *which will create five-sixths of the firm or commercial water power,* severally consist of a large power reservoir upon which is superimposed a relatively small flood control reservoir. These power reservoirs and flood control reservoirs on the tributary projects are as separate and distinct as though they were built at entirely different locations. *These small flood control reservoirs do not and can not produce any firm or commercial power.* (See pp. 38-46, *supra.*)

MAIN STREAM RESERVOIRS. The main stream projects consist almost wholly of reservoirs to create head and store water for power with incidental navigation facilities necessary to prevent complete obstruction to navigation by the TVA power structures. The flood reservoirs superimposed on these power reservoirs other than at Gilbertsville are not only very small (for illustration, only one foot high at Guntersville), but from their very nature and purpose they can produce no firm or commercial power regardless of their size. And it would make no difference if these reservoirs below the power projects were navigation structures (as they are not); for in either event these lower reservoirs would provide no flood control and the superimposed flood control structures would produce no commercial power. (See pp. 49-53, *supra.*)

This is a suit to enjoin the creation, transmission and sale of water power (the water power being converted into electricity for some of these purposes) in competition with the appellants, and hence the foregoing considerations dispose of the issue without examination of the scope of federal power over flood control.

(b) The creation of water power is the primary purpose of the TVA Unified Plan and flood control is minor, if not pretensive, and any attempt to sustain that plan as a flood control project falls as an attempt to accomplish a forbidden object under the pretense of exercising a constitutional power.

A statement and discussion of the pertinent constitutional principle is found at pages 115-121, 96-101, *supra.*

It is a fundamental fact that flood control and power development are conflicting. The flood control reservoirs on the tributary projects are very small in relation to the power reservoirs upon which they are superimposed. Yet the amount of flood control provided at Chattanooga and above (where practically all flood damage in the Tennessee basin occurs) is so small as to be almost valueless in a great flood when flood protection is needed and valuable. The three tributary projects are located on the Clinch, Hiwassee and Little Tennessee Rivers. The TVA Unified Plan makes no pretense of providing any flood protection on the other important tributaries of the Tennessee River, including the Emory River, where the greatest loss of life and damage to property through floods in the Tennessee basin has been experienced. (pp. 46-49, *supra.*) Obviously, a *bona fide* flood control system would have taken care of this situation.

Furthermore, the cost of the flood control structures superimposed on top of these tributary power reservoirs is so small in relation to the cost of the power structures upon which they are built as also to establish that the creation of water power is the primary purpose and the provision of flood control incidental, if not pretensive. *United States v. Constantine,* 296 U. S. 287, 289. Thus, two and six-tenths times as much dependable flood storage could have been provided at the site of the Norris Dam for less than one-fourth the cost of Norris Dam and reservoir.

It is plain that the TVA Unified Plan, taken as a whole, does not materially benefit flood control on the Mississippi River. As General Pillsbury testified before the House Committee on Military Affairs, in reference to the TVA dams, "the effect on the Mississippi would be measured in inches and fractions of an inch in a high flood," and the construction of the TVA dams would not "have an appreciable effect on the flood waters of the Mississippi." (See p. 60, *supra.*) Moreover, it is conceded that the tributary reservoirs are beyond prediction distance (Woodward R. 1783-4, 1806-8) and hence could not be used for flood control on the Mississippi even though local flood protection were sacrificed. A *bona fide flood control system, giving ten times as much dependable flood storage and immeasurably more flood protection*[1] *where needed at and above Chattanooga could have been built for a fraction of the cost of the TVA Unified Plan and for much less than the cost of the three TVA tributary projects alone.* (See pp. 48, 55-57, *supra.*)

The flood control reservoirs superimposed on the main stream power reservoirs are (except at Gilbertsville) even smaller (for illustration, only one foot high at Guntersville) in relation to the power reservoirs upon which they are built. These main stream reservoirs destroy more valley storage than they provide flood storage; and no project may take credit for flood control until it has paid back the storage of which it has robbed nature. The main stream reservoirs above Chattanooga would be flooded out in any great flood when they are really needed. The TVA Unified Plan over-all would not furnish enough flood protection to

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[1] The ratio of increase in flood protection is much greater than the ratio of increase in dependable flood storage because the small amount of flood control provided by the TVA Unified Plan at and above Chattanooga would be almost wholly ineffective in a great flood when flood protection is the most needed and the most valuable.

make practicable the construction of levees necessary for flood protection at Chattanooga. (pp. 49-57, *supra.*) Indeed, more than two years after the TVA Unified Plan had been officially reported to the Congress, the Congress, in apparent recognition of the obvious lack of any material flood control features in that plan, passed the Act of June 28, 1938, directing the Secretary of War and the Corps of Engineers to make a preliminary examination, survey and report for flood control at Chattanooga.

The construction of the TVA Unified Plan will cause annual damages several times greater than the average annual flood damage on the Tennessee River and all its tributaries. The total area normally flooded by the TVA reservoirs (exclusive of Wilson) will be over 465,000 acres (Def. Ex. 153†, p. 919), which greatly exceeds the number of acres occasionally flooded in the Tennessee Valley in a state of nature. Indeed TVA is purchasing more than 912,000 acres for the TVA reservoirs (exclusive of Watts Bar, Coulter Shoals and Fontana projects, for which land has not yet been purchased) to provide the additional land which will be overflowed in time of flood with the necessary margin of shore land. (Def. Ex. 153†, p. 947.) The total average annual flood damages of all kinds *on the Tennessee River and all of its tributaries is only $1,784,000 including the estimated damages from a hypothetical 500 year flood.*[1] (Comp. Ex. 105°, p. 734.)

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[1] The total estimated average annual damage from all floods (including a hypothetical 500 year flood adopted by the Corps of Engineers for the purpose of its estimates) through flooded lands is only approximately $170,000 on the Tennessee River, excluding tributaries, and $291,000 including tributaries. The total estimated average annual damages to all kinds of property in all floods (including the hypothetical 500 year flood) is only about $981,000 on the Tennessee River (excluding tributaries) of which $211,000 occurs below Hales Bar (substantially at Chattanooga), and $770,000 at Chattanooga and above. (Comp. Ex. 105°, p. 734.)

The trial court excluded, as irrelevant and immaterial, evidence that the average annual value of crops standing in September and October (which, of course, did not include crops, such as hay and small grain, harvested earlier) on the land which will be flooded by TVA in the Chickamauga, Guntersville, Pickwick and Wheeler reservoir basins was $3,126,000 or an average of over $20.00 per acre. (Offer to Prove, R. 1244-50; Def. Ex. 153†, p. 947.) On the same basis, the total estimated value of crops on lands which will be flooded by TVA reservoirs at normal pool level (excluding Watts Bar, Coulter Shoals and Fontana for which figures as to the amount of land to be flooded are not yet available) would be over $6,498,000. In addition to the land to be flooded at normal pool level by the foregoing reservoirs, TVA is purchasing, and presumably retiring from production, nearly 600,000 acres more at such reservoirs.

The complete elimination of all flood damages on the Tennessee River and its tributaries (including estimated damages from a hypothetical 500 year flood) would not justify a capital outlay of $45,000,000; and the small TVA flood control reservoirs superimposed on the TVA power reservoirs would not eliminate any substantial part of these damages. It is a fundamental principle that expenditures for flood control structures may not exceed the capitalized value of the flood damages eliminated by those structures. (Compare Declaration of Policy in Omnibus Flood Control Act of June 22, 1936, 49 Stat. 1570, 33 U. S. C. 701a.) Where, as here, it is claimed that structures costing many times the capitalized value of any flood damages eliminated are built for flood control, it is plain that the contention is a pretense and subterfuge.

The facts herein reviewed and many other facts stated at pp. 38-60, *supra,* plainly show that flood control is a minor purpose, if not merely pretensive.

(c) It is plain on the face of the Act that power development is not incidental to flood control.

Earlier in this brief, we have analyzed the TVA Act and shown that power development is the primary purpose of the Act. (See pp. 12-14, pp. 102-106, *supra.*) Just as those analyses of the statute show that power development is not, under the Act, incidental to navigation improvement, so do they also show that power development is not incidental to flood control under the Act. Again the question is not, as the trial court seemed to think, whether the statute went so far as to say that TVA should develop the maximum power resources of the Tennessee basin in disregard of any federal constitutional power or duty in the field of flood control, but whether the statute did direct the TVA to develop the power resources of the Tennessee system. And the statute does say upon its face that whatever Congress intended to do with respect to navigation or flood control, it definitely intended also deliberately, separately and purposefully to develop the maximum power resources of the Tennessee River and its tributaries.

(d) Assuming a determination of the scope of federal power over flood control were involved (which it is not), that power does not extend beyond the power to protect navigation channels and navigation works.

Were the facts of this case such as to require or permit a determination of the scope of federal power over flood control (which they are not), we think it plain that the power of the Federal Government over flood control does not extend beyond the power to protect or improve navigable channels of interstate navigable streams. Cf. *Jackson v. United States,* 230 U. S. 1, 18, 23; *Cubbins v. Mississippi River Commission,* 241 U. S. 351. Navigable streams are natural instrumentalities of interstate commerce; and the Federal Government has been charged with their protection

and improvement. But flood control structures for that purpose may not constitutionally be undertaken by the Federal Government unless the structures have a real, substantial and *bona fide* relation, rather than an indirect, remote and insubstantial relation, to the protection of the navigation facilities. And no flood control benefits to navigation accrue from the TVA Unified Plan. (See pp. 36-37, *supra.*)

Subject to the paramount jurisdiction of Congress over the navigable waters of the United States, the power to protect lives and property from destructive floods is vested in the several States under their police powers. Cf. *Leovy v. United States,* 177 U. S. 621; *Manigault v. Springs,* 199 U. S. 473; *Orr v. Allen,* 248 U. S. 35; *Cubbins v. Mississippi River Commission,* 204 Fed. 299; *St. Louis Southwestern Ry. Co. v. Board of Directors,* 207 Fed. 338.

Such power as Congress may possess in the matter of flood control is implied from the interstate commerce power. Implied powers may not be treated as express powers so that federal power is indefinitely extended by a series of concentric circles of increasing diameter until all constitutional limitations are destroyed. Nor may factual relationships be extended by inference piled upon inference until federal power is made to embrace things having remote, indirect and insubstantial relations to the thing within the federal field. Federal power over flood control may not, therefore, reasonably be extended to include protection against flood hazards to life or property within the several States or to subjects and instrumentalities primarily falling within the jurisdiction and police power of the States. While the Federal Government may spend for the general welfare, it may not itself engage in activities not authorized by the Constitution merely because they may be deemed, or even in fact are, for the general welfare.

Protection of property and people is inherently a matter of local concern. Its relation to interstate commerce is

indirect. Its relation to the States is immediate and comprehensive. To extend the interstate commerce power to such matters, as distinguished from the exercise of the spending power, would be to displace the States in a field so wide that its limits cannot be foreseen. For if that be an appropriate exercise of the interstate commerce power, the matter does not end there. Thus, it would then logically follow, as asserted by the appellees below, that Congress may construct facilities for the protection against floods of any and all of the means of production because the produce or semi-finished and finished articles may subsequently move in interstate commerce. If such a relationship is sufficient to sustain the exercise of the interstate commerce power, then the Federal Government may engage in agriculture, manufacture, and practically all of the internal activities of a State upon the ground that by promoting them, there will be indirectly promoted a movement of interstate commerce. Every activity of production and consumption has some bearing upon interstate commerce, but plainly that power may not be so far extended. Otherwise Congress may, for illustration, forbid or regulate the cutting of wood lots, tiling of boggy meadows and the cultivation of fields, even though such things have only an indirect and negligible effect upon flood control.

B.

The electricity will not be produced as an incident of the exercise of the war or national defense power.

Section 1 of the Act defines the national defense aspects of the Act as follows:

> "That for the purpose of maintaining and operating the *properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense,* and for agricultural and industrial development * * *, there is hereby created

a body corporate by the name of the Tennessee Valley Authority."

It, therefore, appears that the only national defense aspect of the statute is the maintenance and operation of the plants in the vicinity of Muscle Shoals which were adapted for the manufacture of materials useful in making munitions. The evidence introduced by the appellees in this case establishes that the properties of the Government at Muscle Shoals require and utilize only a fraction of the firm power capacity of Wilson Dam as it was constructed under the National Defense Act of 1916. (R. 2223; Def. Ex. 147, R. 4237.)

The national defense powers of the Federal Government are found in the Constitution in Article I, Section 8, Clauses 11 to 16. In summary they include (1) the power to declare and wage war; (2) the power to raise and support armies and navies and call out State militia; and (3) the power to provide for the government of the army, navy and militia. The trial court erroneously assumed that the national defense powers are found in the *limitation* upon the *grant of the power of taxation* contained in Article I, Section 8, Clause 1 of the Constitution and entirely overlooked or ignored the only relevant grants of power in the Constitution. (Opinion R. 559.)

In the emergency of war, the power of Congress under these national defense powers is very extensive. *Northern Pacific R. R. Co. v. North Dakota*, 250 U. S. 135; *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163; *United States v. Pennsylvania etc. Central Coal Co.*, 256 Fed. 703; *The Lake Monroe*, 250 U. S. 246. Undoubtedly in time of war these powers would permit the commandeering of any instrumentality necessary to supply the armed forces (Cf. *International Paper Company v. United States*, 282 U. S. 399; *Highland Co. v. Russell Car & Snow Plow Co.*, 279 U. S. 253) or would authorize the Government to enter

into the manufacture of any product essential to the successful prosecution of the war. But it has never been held that in time of peace the Federal Government may carry on all of the businesses which might be commandeered or which might produce articles essential or convenient in the prosecution of a war. In a modern war practically every business and commercial activity is essential to the successful prosecution of the war. But that does not mean that in time of peace the Constitution authorizes the Federal Government to take over or engage in all private industry and business.

However, apart from these controlling considerations, *the record makes plain that the TVA Unified Plan will not in fact augment the national defense assets of the nation.* The statutory and administrative purposes are that all of the power to be produced by TVA shall be sold for domestic, rural, commercial and industrial uses in displacement of the facilities, businesses and markets of existing utilities. The scheme is merely to substitute TVA facilities for privately owned facilities in the business of supplying electricity to the public. This merely makes domestic, rural, commercial and industrial consumers dependent upon TVA facilities rather than upon privately owned facilities; and manifestly private interests neither can nor will build or maintain facilities to serve a market which has been taken from them on the chance that it may be returned to them *temporarily* in time of war, should TVA find military outlets for its power.

While undoubtedly the facilities of any of these appellants or of any electric utility could be commandeered in time of war, just as the facilities of TVA may be commandeered by the Government in time of war, the fact is that the net total power assets of the nation will be in no wise increased by substituting TVA facilities for privately owned facilities in supplying the peace time needs of the

business, industry and population of the United States. In time of war the business, industry and population *which has been brought to a state of dependence upon TVA facilities,* can no more readily, or with any less severe consequences, be deprived of essential light, heat and power because they are dependent upon TVA facilities than if they had continued to be dependent upon privately owned facilities. Any appropriation of the TVA power facilities for war uses would leave Memphis, Chattanooga and Knoxville (to speak only of the large cities upon which TVA has already fastened its hold) just as dark as though they had continued to be served by private enterprise and it became necessary to appropriate their power supply for war uses.

POINT II.

NEITHER THE STATUTORY NOR THE ADMINISTRATIVE METHOD OF DISPOSING OF THE ELECTRICITY IS WITHIN THE CONSTITUTIONAL POWER OF THE FEDERAL GOVERNMENT AND EACH VIOLATES THE FIFTH, NINTH AND TENTH AMENDMENTS.

The appellees concede that the Federal Government has no power under the Constitution to engage generally in the business of supplying electricity to the public. The constitutional question is, therefore, whether the Federal Government may reach the same result through the exercise of its power to dispose of property, and if so, what if any, are the limitations upon that power which are expressed in our constitution or inherent in our constitutional system.

A.

The power to dispose of federal property does not include any power of regulation or the power to engage in the conduct or management of a business having no relation to the purposes for which the Federal Government was established; and any such purported exercise of that power is in excess of its scope.

We here deal with the *scope* of the power to dispose of property as measured by the terms of the grant and apart from the inherent limitations of our constitutional system. That power is found in Article IV, Section 3, Clause 2 of the Constitution, which, with the material portions italicized, reads:

> "*The Congress shall have power to dispose of* and make all needful rules and regulations respecting the territory or other *property belonging to the United States*; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

That there is a wide difference between the nature of the power to dispose of property and the nature of the great legislative and regulatory powers of the Federal Government (which are granted in Article I, Section 8 of the Constitution) is obvious. The power to dispose of property was granted merely to enable the Federal Government to dispose of the public lands and such other property as might be no longer needed for the governmental purposes for which it was acquired. (*Story, Commentaries on the Constitution,* 5th ed. Vol. II, pp. 202-6.) It is proprietary in nature; and in any event, it carries no grant of legislative or regulatory power over the States or the people.

In *Kansas v. Colorado,* 206 U. S. 46, this Court, after stating that the scope of the power had never been definitely settled, said:

> "* * * But clearly it (the power to dispose of property) *does not grant to Congress any legislative control over the States,* and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." (loc. cit. 89.)

And further:

> "We do not mean that its (United States) legislation can override State laws in respect to the general subject of reclamation." (loc. cit. 92.)

It therefore follows that any purported exercise of the power to dispose of property which is for the purpose, or which has the direct and necessary effect, of exercising or substantially interfering with the exercise of any of the powers reserved to the States, of destroying any functions of the States, of regulating the matters of intrastate concern or of disparaging or destroying any of the rights retained by the people, is *not merely an unconstitutional exercise of this power but is outside of the scope of this power.* While such an exercise of the power to dispose of property would also violate the inherent limitations of our constitutional system (see pp. 140-144, *infra*), the distinction is important; for if a federal act is not within the scope of the constitutional power invoked, it falls; and it is unnecessary to go further and determine whether the act would have violated the inherent limitations of our constitutional system in any event.

The great regulatory powers, such as the power to regulate interstate commerce, transfer a large segment of governmental power to the Federal Government and remove it from the powers reserved to the States and the people under the Tenth Amendment and the rights retained by the people under the Ninth Amendment. But, it can never be said that because of the existence of the power to dispose of property, some element of the police power,

some element of the legislative power, some governmental power or retained right has been taken away from the States or the people that has not been otherwise granted to the Federal Government. Any other conclusion would deprive the States of governmental power and the people of rights never delegated by them, and endow the Federal Government with power never granted but prohibited to it.

That the power to dispose of property is not the power to engage in business plainly appears from the language of the grant as well as from its history. That the clause could ever have been intended to vest such a power in the Federal Government is denied by the known character and purposes of the members of the Constitutional Convention, by the known understanding and atmosphere in which the Constitution was adopted by the States and by the established understanding of the functions of government at the date of the adoption of the Constitution. *Warren, "The Making Of The Constitution,"* 599-600, *South Carolina v. United States,* 199 U. S. 437, 457-9. The fact that the recognition of such a power in the Federal Government, as hereinafter more particularly pointed out, would create an irreconcilable conflict with the power of the States to regulate their internal concerns or to maintain their tax resources, and would destroy the essence of their statehood and the retained right of the people to own and carry on businesses, would seem sufficient to establish the unsoundness of such an interpretation.

"The United States do not and cannot hold property, as a monarch may, for private or personal purposes." *Van Brocklin v. Anderson,* 117 U. S. 151, 158. The United States owns oil reserves, forests, mineral deposits and vast public lands. It can dispose of these various kinds of property. May it, therefore, establish a federally owned and operated corporation to dispose of the oil with a system of pipe lines (high tension transmission lines) and tank farms (electric

substations) throughout the United States and establish United States filling stations at every crossroads in the land? And in establishing such an oil business, would it make any difference whether the Government sold it directly at the crossroad gas stations, or through agents, or through independent dealers, at prices fixed by the federal corporation or its employees? And if so, may it establish a national coal corporation and sell coal at retail in every village in the land? And if so, may it—because of its ownership of forests—establish a lumber company and sell lumber and establish lumber yards in every village? And if so, may it—because of its ownership of public lands—pack vegetables, meats and milk, mill flour and establish a system of super-groceries throughout the United States in order more profitably to "dispose of its property" or even with the altruistic purpose of supplying groceries at less than cost to all or some classes of the people?

If the power to dispose of property grants the Government the right to engage in business, it must necessarily follow that it has a right to do all these things and many more. It must inevitably follow that it has the right and power to establish a legal or *de facto* monopoly in all of the principal businesses generally carried on by private enterprise. It must necessarily follow that it has the right to deprive the States of tax revenues from substantially all of the businesses ordinarily carried on in the State by private enterprise. It must result that it has the power to deprive the people of owning or engaging in most of the businesses ordinarily carried on by private enterprise except as federal employees. It must follow that it has the power to deprive the States of all power to regulate the conduct of these businesses within their borders and to transfer that power of regulation to a group of federal agents working for a federal corporation. Plainly the argument that the power to dispose of property includes the power to carry on business proves too much.

Looking at the language of the grant in its common and accepted understanding, the power to dispose of property is not the power to carry on a business. No trustee or executor granted the power to dispose of, or sell, property would be permitted by any court to engage in the conduct of a business.[1]

The federal possession of property is not the equivalent of a grant of constitutional power. The circumstance of Government possession does not vest the Government with the power to use the property in any way, or as the basis for any business, that a private individual might use it. It does not authorize the Government to engage in activities for which it has received no grant of constitutional power and which may even have been expressly prohibited to it.

This conclusion is reenforced by the established principle that the intrusion of any federal power into a field normally reserved to the States may not be sustained unless the necessity therefor clearly appears. *Florida v. United States,* 282 U. S. 194, 211-12.[2] The same principle dictates that in construing the scope of a federal power (and particularly a power which is non-regulatory and merely a proprietary and implementing power), it should not be construed in a fashion which must inevitably bring it into collision with matters of intrastate concern involving the very

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[1] *Lovewell v. Schoolfield,* 217 Fed. 689, 704; *Fidelity & Deposit Co. v. Moshier,* 151 Fed. 806, 818; *Refling v. Burnet,* 47 F. (2d) 859, 861; *Digney v. Blanchard,* 226 Mass. 335; *Butler v. Butler,* 164 Ill. 171; *Willis v. Sharp,* 113 N. Y. 586; *Lucht v. Behrens,* 28 O. S. 231; *Hull v. Heimrich,* 138 Ore. 117; 3 Bogert, *Trusts and Trustees,* 1819, 2035.

[2] Cf. *Illinois Central R. R. Co. v. Public Utilities Commission,* 245 U. S. 493; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *New York v. United States,* 257 U. S. 591; *Arkansas R. R. Commission v. Chicago, Rock Island & Pacific R. R. Co.,* 274 U. S. 597; *Schechter Poultry Corp. v. United States,* 295 U. S. 495, 546-8; *United States v. Butler,* 297 U. S. 1.

essence of their statehood and their very existence, or so as not merely to disparage but destroy one of the most valuable rights retained by the people, the right to carry on business and earn a livelihood, unless the language and the history of the provision compel such an interpretation. Here the history of the provision repels such an interpretation and the language can be made to cover the interpretation only by attributing to it an unusual and exaggerated meaning, which is neither commonly understood nor commonly used in everyday life or in legal instruments which are daily before the courts for construction.

The instant case not only fails to disclose any compelling reason for such an intrusion into the field normally reserved for the States, but the Court excluded evidence showing that the utilities had offered to purchase all of the power produced by TVA at prices fixed by arbitration, by competitive bidding or by the published rate schedules of TVA and give the electricity the widest possible distribution so as to bring the benefits, if any, of TVA power to the largest number of people. (Willkie R. 1504-7.) Thus the Federal Government would not only have realized the largest possible amount from the sale of its property (if that were its purpose), but would have secured the widest possible distribution of federal electricity, if that were its purpose.

B.

In any event the power to dispose of property may not be used for the purpose, or with the direct and necessary effect, of governing concerns reserved to the States and the people or of upsetting the balance of our dual system of government.

We here deal with the limitations upon the power to dispose of property which are expressed in the Constitution and which are inherent in our constitutional system, that is, the limitations upon the exercise of the power however its *scope* may be interpreted. It is plain that the power to dispose of property is at least subject to the express and implied limitations by which the great regulatory powers of the Federal Government are confined. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288. Even the great affirmative regulatory powers of the Federal Government are subject to the Fifth Amendment and may not be used to achieve prohibited ends, govern concerns reserved to the States and the people or so as to impair our dual system of government and upset the federal balance.[1] Whether a challenged statute or act violates this principle is not merely a question of legislative or administrative intent but also a question of fact. *Wisconsin v. Illinois*, 278 U. S. 367, 415; *Veazie Bank v. Fenno*, 8 Wall. 533, 541.

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[1] *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423; *South Carolina v. United States*, 199 U. S. 437, 451; *Veazie Bank v. Fenno*, 8 Wall. 533, 541; *Collector v. Day*, 78 U. S. (11 Wall.) 113, 124; *Ambrosini v. United States*, 187 U. S. 7; *Pollock v. Farmers' Loan etc. Savings Bank*, 157 U. S. 429, 584; *Hammer v. Dagenhart*, 247 U. S. 251; *Carter v. Carter Coal Co.*, 298 U. S. 238; *Schechter Corp. v. United States*, 295 U. S. 495, 546; *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 37; *Linder v. United States*, 268 U. S. 5, 17; *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555.

In *Ashwander v. Tennessee Valley Authority, supra,* this Court said:

"(3) We come then to the question as to the validity of the method which has been adopted in disposing of the surplus energy generated at the Wilson Dam. The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that *it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.*" (loc. cit. 338.)

* * * * *

"The transmission lines which the Authority undertakes to purchase from the Power Company lead from the Wilson Dam to a large area within about fifty miles of the dam. * * * And the transmission lines for electric energy are but a facility for conveying to market that particular sort of property, and the acquisition of these lines raises no different constitutional question, *unless in some way there is an invasion of the rights reserved to the State or to the people.* We find no basis for concluding that the *limited undertaking* with the Alabama Power Company amounts to such an invasion." (loc. cit. 339.)

* * * * *

"We limit our decision to the case before us, as we have defined it. The argument is earnestly presented that the Government by virtue of its ownership of the dam and power plant could not establish a steel mill and make and sell steel products, or a factory to manufacture clothing or shoes for the public, and thus attempt to make its ownership of energy, generated at its dam, a means of carrying on competitive commercial enterprises and thus drawing to

the Federal Government the conduct and management of business having no relation to the purposes for which the Federal Government was established. The picture is eloquently drawn but we deem it to be irrelevant to the issue here. *The Government is not using the water power at the Wilson Dam to establish any industry or business.*" (loc. cit. 339-340.)

The foregoing quotations plainly establish:

1. That the power to dispose of property "must not be contrived to govern the concerns reserved to the States" (and we assume that the same principle must inevitably apply to the rights retained by the people); and
2. That the power to dispose of property must not be so exercised as to upset the balance of our dual system of government.

And they plainly imply,—what inevitably follows from the foregoing propositions—

1. That, among other things, there is a limit beyond which the Government may not go in the sale of a public utility commodity in the guise of exercising the power to dispose of property; and
2. That the Federal Government may not use the power to dispose of property to establish the Federal Government in a competitive commercial enterprise and draw to that Government the conduct and management of business having no relation to the purposes for which the Federal Government was established.

Obviously this must be so. The very size and nature of the enterprise may be such as necessarily to invade or destroy the rights and functions of the States and the rights retained by the people and to upset the balance of our dual system. If the Federal Government may engage in businesses within the State, it may do so only in the exercise of federal constitutional power and hence with immunity from State police power.

The trial court wholly failed to consider any of the controlling limitations pointed out by this Court in the *Ashwander* case (Opinion R. 562-5). The majority of the trial court declined to make the essential findings of fact upon which such legal questions must be determined. Some, but not all, of such essential findings were made by Judge Gore in his Additional Findings.

Thus the trial court wholly failed to consider or answer the questions: (1) whether a federally owned and operated electric system with 15,000 miles of transmission lines covering all, or large parts, of eight States, and with generating capacity more than adequate to supply this vast territory might be considered a "limited undertaking"; (2) whether a federal undertaking of that size, coupled with a specific and detailed regulation of the rates, services and practices of local electric distribution and the imposition of a policy of having the local electric business carried on by publicly owned or non-profit organizations constitutes an invasion of State rights; (3) whether such a vast undertaking upsets the balance of our dual system of government; (4) whether the taking over of the local electric business by the United States and the consequent deprivation of the right of the people to engage in that business, subject only to local regulation, violates the Ninth and Tenth Amendments; and (5) whether the *de facto* regulation of privately owned utilities, pending their acquisition or destruction by TVA, and the *de facto* prevention of State authorities from regulating them, or even compelling continued service where they had been bankrupted or dismembered by the activities of TVA constitutes an invasion of the rights reserved to the States or the people.

The trial court merely ignored the rights retained by the people. It disposed of the question of the invasion

of the reserved powers of the States by holding: (1) that federal usurpation of State powers is cured by State consent, and (2) that even if there is an unconstitutional invasion of the rights reserved to the States, only the State can object. These errors of the trial court are discussed later at appropriate points in this brief.

C.

The power of the State to authorize and regulate the business of supplying electricity to the public within the States is complete, unqualified, exclusive and inalienable.

The distribution and sale of electricity within the States is a local public service. That the business is subject to full and complete regulation by the States under their inherent police powers does not admit of doubt. *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 374; *Munn v. Illinois*, 94 U. S. 113, 124; *Nebbia v. New York*, 291 U. S. 502, 524; *Slaughter-House Cases*, 83 U. S. 36. It is one of the most characteristic and well established subjects of local police power. It is a subject as to which "the authority of the State is complete, unqualified and exclusive." *Nebbia v. New York, supra*, loc. cit. 524. Any Federal interference in this field "is plainly repugnant to the exclusive power of the State over the same subject," (*License Tax Cases*, 5 Wall. 462, 471); for the exercise of State police power "is not subject to national supervision." *South Carolina v. United States*, 199 U. S. 437, 453.

Acting under its police power to promote the health, welfare and prosperity of its people, a State in regulating this business, may:

1. require a franchise for carrying on the business;
2. define the area in which the holder of the franchise may carry on the business;

3. prohibit duplication of facilities to reduce costs, promote efficiency of service and protect investments made to provide the public service;
4. compel extensions of service;
5. prohibit abandonment of service or, stated conversely, enforce continued service at non-confiscatory rates;
6. determine the internal policy of the State as to public or private ownership and operation of local utilities;
7. regulate rates and rate policies;
8. regulate the quality, terms and conditions of the service other than rates; and
9. determine whether and to what extent the regulatory power of the State shall be exercised or held in abeyance.[1]

This partial enumeration of common forms of State regulation by no means exhibits the scope of the State's discretion in controlling this local public business as it deems best for the health, welfare and prosperity of its people. Thus in the matter of rates alone, the State may adopt a policy of favoring industrial use over commercial and domestic use, or the converse, as it deems best for the promotion of the prosperity of the State. It may adopt a policy of uniform rates throughout the State to promote dispersion of industry, decentralization of population and equality of opportunity, or it may require rates to be based

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[1] Among cases illustrating the exercise of these powers are: *New York ex rel. v. McCall*, 245 U. S. 345; *New York ex rel. v. Public Service Commission*, 269 U. S. 244; *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, 85-6; *Bullock v. Railroad Commission*, 254 U. S. 513; *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396; *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 309; *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 374; *Milwaukee Electric Ry. v. Wisconsin Railroad Comm.*, 238 U. S. 174; *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 419; *Great Northern Ry. v. Washington*, 300 U. S. 154.

upon costs in each local area. It may regulate rates of publicly owned utilities or not as it sees fit. *Wisconsin Traction, Light, Heat & Power Co. v. Menasha,* 157 Wis. 1; *Wheeling v. Benwood-McMechen Water Co.,* 115 W. Va. 353; *Georgia Public Service Commission v. City of Albany,* 180 Ga. 355; See Note 76 A. L. R. 851. It may determine when and how its water resources may be developed for power and other non-federal uses. Full and complete discretion in the premises is reserved to the States under the Tenth Amendment.

No federal power whatever exists in the premises. There is *no vague or nebulous power* in the Federal Government to right supposed wrongs committed by the States. Thus, in *Carter v. Carter Coal Co.,* 298 U. S. 238, 291, this Court said:

> "The proposition, often advanced and as often discredited, that the power of the federal government *inherently extends* to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to *promote the general welfare,* have never been accepted but *always definitely rejected by this Court.*"

And further:

> "* * * It is no longer open to question that the general government, unlike the states, * * * *possesses no inherent power in respect of the internal affairs of the states*; and emphatically not with regard to legislation. * * *
>
> "* * * And adherence to that determination is incumbent equally upon the federal government and the states. *State powers can neither be appropriated on the one hand nor abdicated on the other.* As this court said in *Texas v. White,* 7 Wall. 700, 725,—'the preservation of the States, and the maintenance of their governments, are as much within the design and care

of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and *the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain.* It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." (loc. cit. 295-6.)

This police power of the States is inalienable. In *Northern Pacific R. Co. v. Minnesota ex rel. Duluth,* 208 U. S. 583, this Court said:

"* * * But the exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety." (loc. cit. 598.)

An additional and insurmountable objection arises where the prospective alienee is the Federal Government; for a State may not contract with the Federal Government for its exercise of powers which are prohibited to it and reserved to the State. Both are constitutionally without power so to contract. A State is not only without power to contract not to exercise its police powers, but it is also without power to delegate the exercise of its police powers to another government. I *Cooley's Constitutional Limitations* (8th Ed.) 224.

D.

Under the Ninth Amendment, the people have the right to earn a livelihood, and acquire and use property by engaging in the electric business, subject only to State regulation.

Under the Tenth Amendment all powers not granted to the Federal Government are reserved to the States or the people. One of the rights thus reserved to the people is the right of local self-government, that is, to manage and control their internal affairs without supervision or interference by the Federal Government.

The Ninth Amendment provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

One of the rights which was not enumerated and which was retained by the people is the right to earn a livelihood and to acquire and use property by engaging in businesses in the various States, subject only to the regulation of the States and free from interference by the Federal Government. Cf. *Steward Machine Co. v. Davis*, 301 U. S. 548, 580. Both this view of the nature of the right and that it is one of the rights protected by the Ninth Amendment is supported by contemporary evidence. Virginia and other States ratified the Constitution with reservations, stating in part:

> "That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable rights of the people."

And further stating that:

> "there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, * * *." (Formation of the

Union, p. 1027, cited by Kelsey, "The Ninth Amendment to the Federal Constitution," 11 Ind. L. J. 309.)[1]

But whether or not properly designated as a natural right, it is in any event plainly a right retained by the people under our constitutional system. In the *License Tax Cases*, 5 Wall. 462, this Court said:

> "No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject." (loc. cit. 471.)

In *Duke Power Company v. Greenwood County*, 91 F. (2d) 665, the court commented on this right as follows:

> "It is said that every person engaged in business which is subject only to State control has the right to pursue that business free from the regulation of the Federal Government. This is true; * * *." (loc. cit. 676.)

And the court might well have added that the people are protected against the greater invasion of this right which would be incident to the Government entering into and making a federal monopoly of such a business with the consequence of completely destroying the right of the people to engage in it.[2] Even the great substantive con-

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[1] See also remarks of Madison in House of Representatives, Monday, May 8, 1789, I Annals of the Congress of the United States, First Congress, The Debates and Proceedings in the Congress of the United States, 437, 439.

[2] For cases holding that the right to engage in business, acquire property and earn a livelihood are rights of individuals which are protected under our constitutional system, see *New State Ice Co. v. Liebmann*, 285 U. S. 262, 278; *Dent v. West Virginia*, 129 U. S. 114, 121; *Duplex Co. v. Deering*, 254 U. S. 443, 465; *Buchanan v. Warley*, 245 U. S. 60, 74; *Liggett Co. v. Baldridge*, 278 U. S. 105, 111; and *Truax v. Corrigan*, 257 U. S. 312, 327.

stitutional powers may not be exercised so as to "disparage" or "deny" this right. Much less may a mere proprietary power such as the power to dispose of property be so used.

When the Constitution was adopted there was no thought that it authorized the Government to usurp, or created the possibility of the Government usurping, "the ordinary business of individuals" and "driving them out of the market"; and if such a possibility had been envisioned it is plain that "the Constitution would not have been adopted, or an inhibition would have been placed among Madison's amendments." Then "all avenues of trade were open to the individual. The Government did not attempt to exclude him from any. Whatever restraints were put upon him were merely police regulations to control his conduct in the business, and not to exclude him therefrom. The Government was not a competitor nor did it assume to carry on any business which ordinarily is carried on by individuals." *South Carolina v. United States*, 199 U. S. 437, 457-9. By the Ninth Amendment this right of the people to engage in business within the States free from ouster by the Federal Government was specifically retained.

In this aspect of the case the fundamental question is also raised as to whether the Constitution assumes the local and private development, ownership and management of natural resources, or whether, on the contrary, it authorizes the Federal Government, a government of delegated powers, to develop and manage natural resources, even though not incidental to the exercise of some one or more of the delegated powers. We think it plain that constitutional amendment is necessary if the Federal Government is to obtain the great substantive power of developing and managing the water power resources of the watersheds of the great navigable streams.

E.

To the extent that statutory and administrative methods of disposing of property are constitutional, they are supreme; and consequently in case of conflict between a purported exercise of the power to dispose of property and the reserved powers of the States and the people and the retained rights of the people, such purported exercise of the federal power must be held unconstitutional or the reserved powers of the States and the people and the retained rights of the people are destroyed.

Any purported exercise of the power to dispose of property must be judged in the light of this principle. If the methods of disposal of the electricity authorized by the TVA Act and employed in the TVA Unified Plan are valid and constitutional, there can be no question, as will hereinafter appear, but that the method of distribution of electricity and consequently electric service to the public in the States, has been placed beyond State regulation. Whatever TVA may lawfully do, it is supreme in doing. There is no neutral ground. The Federal Government has no inherent powers, but only the powers given it in the Constitution and with respect to them the States must give way.

In *Butler v. United States*, 297 U. S. 1, it was argued that the Act was not compulsory on the States, since any State—

> "* * * may declare the contract void and thus prevent those under the State's jurisdiction from complying with its terms." (loc. cit. 74.)

Of that argument this Court said:

> "The argument is plainly fallacious. The United States can make the contract only if the Federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, *its exertion cannot be displaced by State action.*" (loc. cit. 74.)

And so in the *Ashwander* case (297 U. S. 288), this Court said:

> "To the extent that the power of disposition is thus (in the Constitution) expressly conferred, it is manifest that the Tenth Amendment is not applicable." (loc. cit. 330.)

Or as phrased in *United States v. California*, 297 U. S. 175, 184:

> "The sovereign power of the States is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution."

It therefore follows that if, as hereinafter appears, the method of disposal of the electricity authorized by the TVA Act and employed in the TVA Unified Plan deprives the States of their power to regulate this local public service and deprives the people of their right to engage in this business, it must be held that this method of disposal of property is unconstitutional and void *or* it must be held that this proprietary and ancillary power has taken away the police powers of the States in this important and extensive field and has destroyed the right of the people to engage in this business. The issue is squarely made. It may not be avoided.

F.

Both the TVA Act and the TVA Unified Plan must be judged by their natural and reasonable effect in the situation in which they operate.

It is a fundamental principle of constitutional law that the validity of a statute must be judged by its natural and reasonable effect. The natural and reasonable effect of a statute must be determined both from a consideration of the language of the statute on its face and from a consideration of the practical operation of the statute in the situation

to which it applies.[1] In *Collins v. New Hampshire,* 171 U. S. 30, 33-34, this Court stated the rule in the following language:

> "*The direct and necessary result* of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. *In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.*"

In *Standard Oil Co. v. Graves,* 249 U. S. 389, 394, this Court said:

> "It (the statute) must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

Obviously, administrative action in the execution of the statute must similarly be judged by its "direct and necessary result" and by its "natural and reasonable effect." The administrative agents of the Congress may not escape the limitations which bind Congress itself. *United States v. Reynolds,* 235 U. S. 133, 148; *Ho Ah Kow v. Nunan,* 12 Fed. Cas. (No. 6546) 252.

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[1] *Collins v. New Hampshire,* 171 U. S. 30, 33-34; *Hammer v. Dagenhart,* 247 U. S. 251, 275; *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1, 27; *Stewart Dry Goods Co. v. Lewis,* 294 U. S. 550, 555; *Minnesota v. Barber,* 136 U. S. 313, 319; *Spradlin v. Royal Mfg. Co.,* 73 F. (2d) 776, 778; *Carolina & N. W. Ry. Co. v. Clover,* 46 F. (2d) 395, 398; *Atlantic Refining Co. v. Trumbull,* 43 F. (2d) 154, 159.

G.

The natural, reasonable, intended and inevitable effect of the operation of the method of disposal authorized by the TVA Act and employed in the TVA Unified Plan is to govern matters reserved to the States and to the people, upset the balance of our dual system of government, deprive the people of their rights under the Ninth and Tenth Amendments, and take property in violation of the Fifth Amendment.

We now examine the scope of the enterprise authorized by the TVA Act and established by the TVA Unified Plan, and their direct and necessary effect upon the powers reserved to the States and the people, and the rights retained by the people.

1. **The TVA Act authorizes, and the TVA Unified Plan establishes, a commercial business of such size and nature as necessarily to destroy the powers reserved to the States and the people, and the retained rights of the people, in all of Tennessee and large parts of six or more other States.**

The undertaking authorized by the TVA Act and established by the TVA Unified Plan consists of a federally owned and operated electric system to serve the public in all of Tennessee and large parts of six or more other States.

(a) The TVA Act authorizes TVA to develop all of the power resources of the Tennessee River and its tributaries. (See analysis of Act, pages 12-14, *supra.*) To augment and firm up this vast hydro-electric capacity, TVA is authorized to construct and acquire steam generating plants. (Sec. 4(j).) While no additional grant of power in respect to power development would seem necessary or possible, the scope of the power development is emphasized by the provision that the President shall recommend any additional legislation which he may deem proper for the

"especial purpose of bringing about in said *Tennessee drainage basin and adjoining territory* • • • *the maximum generation of electric power* consistent with flood control and navigation." (Sec. 23.)

In 1930, the Corps of Engineers reported to Congress that the maximum development of the power resources of the Tennessee River and its tributaries would produce a firm or dependable power capacity of 5,000,000 kilowatts and an annual firm or dependable energy output of 25,000,000,000 kilowatt-hours. (Comp. Ex. 105°, p. 3, par. 10; p. 88, par. 67.) At the same time the Corps of Engineers advised the Congress that the total annual output of both firm and secondary power in the entire Tennessee River basin was then approximately 1,180,000,000 kilowatt-hours and that the estimated demand for 1950 was only 5,900,000,000 kilowatt-hours.[1] (Comp. Ex. 105°, p. 16, par. 21.)

It is thus apparent that the amount of power which TVA was authorized to develop vastly exceeded the entire market for, or use of, electricity which then existed or could be expected to exist in the measurable future, if ever, within practicable transmission distance from the power sites authorized to be developed. However, a mere inspection of a map is sufficient to show that the area of practicable transmission of power covers the entire State of Tennessee and large parts of the six other States of which any part lies in the Tennessee basin, as well as parts of additional States. (Comp. Ex. 327*.)

The Act authorizes TVA "to unite the various power installations into one or more systems by transmission lines" (Sec. 4 (j)), so as to create one vast grid system or power pool. *This was not only to increase the firm power capacity but also so that the entire power capacity of this vast power pool could be drawn upon by tapping the trans-*

[1] This estimate was based upon a rate of increase which past experience indicated and subsequent experience has shown to have been far too great.

mission or grid system at any point. The Act thus provided for a power supply unlimited in relation to the market which would be physically accessible. It authorized a transmission system which would blanket this vast area physically accessible to the power to be developed. (Sec. 12.)

(b) *The TVA Unified Plan is only a stage in the execution of the statute—a mere current construction schedule*; and already TVA has sought and obtained funds for preliminary investigation of additional power sites. (See pp. 17-20, 68, *supra*.) As TVA has reported to Congress and as other evidence shows, *in an extreme low water year* the completed TVA Unified Plan (*without the aid of any TVA steam generating plants now existing*[1] *or which may be constructed under Sec. 15 of the Act*), will have a capacity nearly *eight times* as great as the total amount of electricity, *both firm and secondary*, generated in 1936 for public use by public utilities in the entire State of Tennessee, more than twice as great as the total generation of electricity, *both firm and secondary*, for public use by public utilities in the entire States of Tennessee, Alabama and Mississippi, and equal to more than 80 per cent of the entire generation of electricity, *both firm and secondary*, for public use by public utilities in the entire States of Virginia, North Carolina, Georgia, Kentucky, Tennessee, Alabama, and Mississippi, the seven States of which any part lies in the Tennessee River basin.[2] *In an extreme low water year* the TVA Unified Plan alone will have a capacity more than *twice as great* as the total sales of electricity, both firm and secondary, by public utilities within the entire area lying within

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[1] In addition to the steam generating plants at Muscle Shoals, TVA now owns steam generating plants at Corinth and Tupelo, Mississippi. (Comp. Ex. 116†, pp. 464, 466, R. 2706A, 2706C.)

[2] An inspection of the map (Comp. Ex. 327*), will show that substantial parts of these States, with the exception of Tennessee and Kentucky, lie more than 250 miles from any of the TVA dams, and hence beyond practical transmission distance.

100 miles of any of the dams included in the TVA power system, and substantially greater than the total sales of electricity, both firm and secondary, by public utilities within an area lying within 150 miles of any of such dams. *In a typical or average water year* the capacity of the TVA Unified Plan will be nearly 33⅓ per cent greater than in an extreme low water year without the use of steam plants constructed[1] or which may be constructed. (See pp. 66-69, *supra.*)

All of the large power plants in the TVA power system are now interconnected, or are to be interconnected, to form one huge power pool so that the entire power resources may be tapped at any point. The TVA Unified Plan contemplates and requires a vast transmission system to market the electrical energy to be produced. (See statement of Dr. A. E. Morgan at Congressional Hearings, Comp. Exs. 109†, pp. 166, 187, R. 2635, 2641; 112†, pp.

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[1] Generating capacity, extreme low water year, under TVA Unified Plan—firm and secondary, without use of steam plants 7,660,000,000 kwh.

Average or typical water year (Comp. Ex. 509, R. 3350) 10,000,000,000 kwh.

Generated for public use by public utilities, 1936, entire State of Tennessee—firm and secondary (Comp. Ex. 486, R. 3329) 1,000,000,000 kwh.

Generated for public use by public utilities, 1936, entire States of Alabama, Tennessee and Mississippi—firm and secondary (Comp. Ex. 486, R. 3329) 3,700,000,000 kwh.

Generated for public use by public utilities, 1936, entire states of Virginia, North Carolina, Georgia, Kentucky, Tennessee, Alabama and Mississippi—firm and secondary (Comp. Ex. 486, R. 3329) 9,300,000,000 kwh.

Total sales by utilities, 1936, for consumption within 100 miles of TVA dams—firm and secondary (Comp. Ex. 499, R. 3332) 3,660,000,000 kwh.

Total sales by utilities, 1936, for consumption within 150 miles of TVA dams—firm and secondary (Comp. Ex. 499, R. 3332) 7,160,000,000 kwh.

262-3, 270, R. 2674-5, 2678-9; 114†, p. 525, R. 2685.) The testimony is uncontradicted that a transmission system of from 12,000 to 15,000 miles will be required for that purpose. The total mileage of transmission lines of the eighteen companies which were originally parties to this appeal, including their transmission lines in large areas lying more than 250 miles from any of the TVA dams, is only approximately 11,000 miles. The total mileage of transmission lines in the entire State of Tennessee, exclusive of TVA lines, is only a little over 2,000 miles. *It is thus apparent that the electric system provided by the stage in the execution of the TVA Act known as the TVA Unified Plan, will blanket the entire State of Tennessee and large parts of adjoining States.* (See pp. 65-70, *supra.*)

It is inconceivable that the TVA Unified Plan, and much less the statutory scheme, could be held to constitute a "limited undertaking." That such mammoth undertakings (free as they are from regulation by the States) must invade the powers reserved to the States, upset the federal balance, and destroy the rights retained by the people is, we think, a case of *res ipsa loquitur. If such mammoth federal undertakings are valid, the right of the State to regulate entry into this local public business and the right of the people to engage in that business, subject only to State regulation, will be effectively destroyed.*

In the *Ashwander* case, this Court sustained the transaction because it was a "limited undertaking" which did not "amount to such an invasion."[1] Both of the

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[1] The *Ashwander* case involved only power produced at Wilson Dam which was constructed under the National Defense Act of 1916, a short mileage of low voltage transmission line *suitable only for local service,* and a comparatively small mileage of rural and urban distribution lines. The firm capacity of Wilson Dam, as constructed under the National Defense Act of 1916, was only 28,000 kilowatts irrespective of load factor (Kurtz R. 1217;

(Continued on page 159)

quoted phrases are terms of degree. *Both plainly recognize the existence of a dividing line beyond which the TVA power operations will not be so "limited" but will "amount" to an invasion.* There are many occasions in the law for the application of the rule of reason expressed by Mr. Justice Cardozo in his concurring opinion in the *Schechter* case (loc. cit. 554) that—

> "The law is not indifferent to considerations of degree"

to which he added in his dissenting opinion in the *Carter Coal Company* case (loc. cit. 327):

> "It can not be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the States."

Once it is understood that there is *a dividing line*, which protects the States in their power to regulate this public service and the people in their right to engage in this business, it is plain that if the power of the States and the right of the people are to have and retain any substance, that line has been definitely passed.

2. The TVA Act, as a purported exercise of federal power, authorizes TVA to exercise, and under the TVA Unified Plan, TVA is exercising, the authority to engage in the business of supplying electricity to the public within the States.

(a) The TVA Act, having authorized the creation of this vast electric system, then authorizes TVA to engage in the business of supplying electricity to the public without

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Putnam R. 1167) and such firm capacity would be insufficient to serve even one of the larger towns which TVA has now contracted to serve. Thus such firm power capacity is less power than TVA has contracted to supply to either Chattanooga (Comp. Ex. 129, R. 2859), or Knoxville (Comp. Ex. 118, R. 2808), and hardly more than half as much power as TVA has contracted to supply to Memphis (Comp. Ex. 118, R. 2807). The TVA Unified Plan has a firm capacity at 60% load factor, 40 times as great as that of Wilson Dam, as originally constructed (Kurtz R. 1215, 1217).

State franchise or regulation in any and all of the States within practicable transmission distance. (See analysis of TVA Act, pp. 14-17, *supra.*)

Although state-regulated utilities may not build competing lines without express authorization by the State and may not extend their lines into areas which will not justify the service and thereby impose what the State deems to be an unjustified burden upon public electric service to the industries and citizens of the State,[1] TVA may build duplicate lines at will. It may seize the cream of the territory and business of state-regulated agencies supplying this public service and thereby disable such agencies from supplying the service in the thin or scattered markets remaining or greatly increase the cost of so doing. Thus, TVA has attempted to take over the business of The Tennessee Electric Power Company in Chattanooga, which constitutes the heart of its integrated business and makes possible economical and efficient service throughout the sixty-four counties in the State of Tennessee in which it offers service.

At the time of the trial below the appellees were attempting to seize the markets of the Tennessee Public Service Company in the City of Knoxville and thereby leave that state-regulated agency with fringes of thin territory and an unprofitable transportation system so as to make virtually impossible the continuance of service in its territory outside of the City of Knoxville and the continuance of this transportation service in that City. Since

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[1] Cf. Tennessee Code, 1932, Sections 5502, 5504, 5451; Order of Tennessee Railroad and Public Utilities Commission, Jan. 1, 1937, Docket No. 2045; Acts of South Carolina, 1932, No. 871 Secs. 2(j), 2(w); Alabama Laws, 1920, p. 38, §49; Kentucky Laws 1934, c. 145, §4(l); West Virginia Laws, 1935, c. 115, Sec. 11; North Carolina Consolidated Statutes §2784; Virginia Laws, 1936, p. 1056; *State v. Nashville Railway & Light Co.*, 151 Tenn. 77.

this appeal was taken, the Tennessee Public Service Company has sold all of its electric properties in Knoxville and vicinity to TVA and the City of Knoxville,—rather obviously, we think it fair to say, in order to escape this economic destruction which threatened to become a *fait accompli* before this appeal could be heard.

All this TVA may do, if the Act is valid, without the consent or regulation of the State and in destructive competition with the agencies to which the State has granted franchises to provide and secure this local public service. And when TVA has driven out the state-regulated agencies, occupied the field and created a situation where the public is helplessly dependent upon the continuation of that service for the protection and promotion of public health, safety and prosperity, TVA may abandon or withdraw its service in whole or in part without State consent. Cf. *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 309.[1] *It is manifest that to the extent that TVA takes over the business of supplying this public service, the*

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[1] For cases illustrating the power of the State to enforce continued service by utilities so long as the public supplies sufficient patronage to afford a fair return at reasonable rates, see also *New York ex rel. v. Public Service Comm.*, 269 U. S. 244; *Railroad Commission v. Eastern Texas R. R.*, 264 U. S. 79, 85-6. To the effect that a utility cannot pick and choose the localities in which it will serve and withdraw from given localities at will without the consent of the State, see *United Fuel & Gas Co. v. Railroad Commission*, 13 F. (2d) 510; *Peoples Natural Gas Co. v. Public Utilities Comm.*, 279 Pa. St. 252; *Fort Smith L. & T. Co. v. Bourland*, 267 U. S. 330, 336; *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122; *Public Service Gas Co. v. Newark*, 86 N. J. Eq. 384, 388; *Southern R. R. Co. v. Hatchett*, 174 Ky. 463; *Colorado & S. R. Co. v. State Railroad Comm.*, 54 Col. 64; *Colorado Tel. Co. v. Wilmore*, 53 Col. 385; *Northern Ill. L. & T. Co. v. Ill. Comm. ex rel. Ottawa*, 302 Ill. 11; *Ches. & Ohio R. R. v. Public Service Comm.*, 242 U. S. 603; *Pittsburgh & Shawmut Coal Co. v. Delaware & N. R. Co.*, 289 Fed. 133, 134-5; *Hocking Valley R. Co. v. Public Utilities Comm.*, 92 O. S. 9; *Brownell v. Old Colony R. Co.*, 164 Mass. 29; *New York & Quebec Gas Co. v. McCall*, 245 U. S. 345, 351.

police power of the State to protect and promote the public health, general welfare and prosperity of the people in this vital and inherently local field is gone forever. And the slightest consideration of the size of the enterprise sought to be authorized by the Act shows that it will be gone in the entire State of Tennessee and in large parts of six or more neighboring States. (See pp. 82-85, *supra.*)

(b) The TVA, acting under this purported statutory authority, is already engaged in the intrastate business of supplying electricity to the public in four of these States, that is, Tennessee, Alabama, Georgia and Mississippi and has contracted to supply electricity in Kentucky. The size and nature of the TVA Unified Plan makes certain that upon its completion TVA will necessarily extend its business[1] into large areas of the other States of which any part lies in the Tennessee River basin. The size of the TVA Unified Plan alone (which is a mere stage in the execution of the statute) makes certain that its completion will result in TVA driving out state-regulated agencies, occupying the field and creating public dependence upon its service throughout practically all, if not all, of the State of Tennessee and large parts of six or more neighboring States.

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[1] That TVA is now engaging and under the TVA Unified Plan will further engage in a gigantic commercial business or industry can not be denied. To deny it would be to say that supplying electricity to the public is not a business or industry and that no public utility in the United States is engaged in business or industry. The TVA Act specifically refers to "*its (TVA's) business in generating, transmitting and distributing electric energy.*" (Sec. 26.) In official statements issued to the public through the press, all of which were excluded by the court as immaterial, the appellees have stated: "*The Act definitely puts the Federal Government into the business of rendering electric service.*" (Comp. Ex. 815, R. 3732.) "The Tennessee Valley Authority power program is not a taxpayers' subsidy. *It is a business undertaking.*" (Comp. Ex. 790, R. 3681.)

That to the extent that TVA takes over the business of supplying electricity to the public in these States, the States will be deprived of all police power over that peculiarly local public service is not open to debate. And it is equally clear that the right of citizens to earn a livelihood and to acquire and use property by engaging in that business will be gone forever.

3. The TVA Act authorizes TVA to regulate, and under the TVA Unified Plan, TVA is exercising the power to regulate, its own rates and service, the rates and service of distributors of TVA power and the rates of privately owned and state-regulated utilities operating in the area.

Regulation by TVA of its own Rates and of the rates of TVA distributors. (a) The TVA Act authorizes TVA to fix its own rates. (Sec. 14.) TVA is authorized to regulate the rates of distributors of TVA power by including "in any contract for the sale of power such terms and conditions, including resale rate schedules, * * * as in its judgment may be necessary or desirable for carrying out the purposes of this Act." (Sec. 10.) It is authorized to regulate all of the terms and conditions of service of distributors of TVA power by establishing "such rules and regulations" as it deems necessary or desirable. (Sec. 10.) Where TVA temporarily sells power to persons doing business for profit, it shall require that resale rates "shall not exceed a schedule fixed by the (TVA) board *from time to time* as reasonable." (Sec. 12.) [1] All of these rates are to be fixed by TVA without hearing and without appeal or review.

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[1] As hereinafter more particularly pointed out, the statutory scheme is to establish a policy of having the local electric business carried on by public agencies and non-profit organizations; and sales of power to corporations or persons supplying electricity to the public for profit is contemplated only as a temporary expedient for disposing of the surplus of TVA power in the interim while that policy is being fully established.

TVA is required to establish a policy in the various States of favoring domestic and rural use over industrial use. (Sec. 11.)[1] Whether the State believes that favoring industrial use will, by stimulating the development of the State, best contribute to the public prosperity is immaterial. This policy is fixed by the TVA Act without regard to the assent or non-assent of the States. TVA must require power marketed through municipalities and non-profit organizations to be "distributed without discrimination" according to the TVA theories in that field of rate regulation. (Sec. 12.) TVA "may make such rules and regulations governing the sale and distribution of such electric power as in its judgment may be just and equitable." (Section 10.) Again all of these regulations are to be made by TVA without hearing and without appeal or review.

(b) TVA, acting under the authority of the statute, has been and still is consistently exercising the power to fix its own rates, terms and conditions of service and to regulate the rates, terms and conditions of service of all distributors of TVA power. (See pp. 80-82, *supra.*) TVA expressly denies the power of the States to regulate its

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[1] The bald attempt to usurp State powers is strikingly illustrated by the fact that this declaration of policy in the TVA Act is taken literally from the declaration of policy in the Power Authority Act of the State of New York, where the State in the exercise of State powers, declared:

"• • • in the development of hydroelectric power therefrom, the said project shall be considered primarily as for the benefit of the people of the state as a whole and particularly the domestic and rural consumers, to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose to be utilized principally to secure a sufficiently high load factor and revenue return which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity." (Ch. 772, Sec. 5, (5), Laws of 1931, New York.)

rates, terms and conditions of service or the rates, terms and conditions of service of distributors of TVA power.[1] All of the contracts between TVA and distributors of TVA power require the distributors to observe resale rate schedules attached to the contract and to submit to such further regulation as TVA has seen fit to impose. (See pp. 206-209, *infra.*) Thus TVA is authorized, and claims the right, to fix its rates and the rates of distributors of TVA power as it chooses. *It may double its rates or cut them in two and, if the TVA Act is valid, the States are powerless in the premises.* It may discriminate between different localities in fixing rates. It may establish uniform rates throughout the States in which it operates or it may fix a different rate for every village. It may take over one-half of a State and establish an entirely different rate structure and policy from that established and enforced by the State in the remainder of its territory. And if the TVA Act is valid, then, as TVA has claimed, these are "matters clearly beyond your (State) control."[1] *Manifestly there is no relation between the regulation of the resale rates of distributors of TVA power, public, non-profit or private, and the disposal of Government property.*

If the TVA Act is valid, manifestly to the extent that TVA displaces state-regulated agencies and occupies the field of supplying electricity to the public, the power of the States to regulate rates and to impose any of the other regulations of this local public service commonly invoked in the public interest is taken away. And the right of the peo

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[1] The trial court excluded, as immaterial, a written statement filed with the Alabama Public Service Commission and signed by all three Directors of TVA, in which TVA declined to submit for examination by such Commission its cost records and books, and said: "*And since your Commission cannot directly determine the rates and rate policies of this national agency, it should not try to do this indirectly, by calling for testimony concerning matters clearly beyond your control.*" (Comp. Ex. 884, excluded; R. 3878, 3880-1.)

ple to engage in the business is destroyed. Again, we invite the attention of the Court to the fact that the size of the electric enterprise included in the TVA Unified Plan makes certain that this deprivation of the powers of the States and the rights of the people will extend throughout Tennessee and large parts of six or more neighboring States. Nor can the size of the enterprise properly be viewed apart from the fact that the power is to be sold at subsidized rates which do not meet the costs of production, transmission and distribution, and with which state-regulated agencies, which must bear all of these costs, obviously can not compete. (See pp. 79-81, *supra.*) The situation may be aptly illustrated by *paraphrasing* the language of this Court in *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, as follows:

> "The city (TVA) might fix such prices as it chose for its water (electricity) and might even furnish it free of charge to its citizens (the public) and raise the funds for maintaining the works by a general tax. It (TVA) would be under no obligation to conduct them for profit, and the citizens would naturally take their water (electricity) where they could procure it cheapest. The plaintiff (appellants), upon the other hand, must carry on its business (their businesses) at a profit, or the investment becomes a total loss." (loc. cit. 11.)

It is thus plain that the displacement of state-regulated agencies and the pre-emption of the field of supplying electricity to the public by TVA is inevitable. And, ironically, one of the major subsidies which makes this result inevitable is the deprivation of the States of their tax revenues which in 1937 amounted to many millions of dollars from these appellants alone. Nor may the situation properly be viewed apart from the facts (1) that, with the exception of one or two small municipalities which owned and operated their distribution systems at the time of the passage of the

TVA Act, every municipality now or formerly served by appellants with which TVA had a contract at the time of trial was the beneficiary of a PWA grant of 30 or 45 per cent of the cost of the distribution system, and in most cases of a loan for the cost of the balance, repayable only out of earnings, if any, to be derived from the distribution of TVA power, and (2) that the facilities of practically every non-profit organization distributing TVA power had been constructed by TVA and had been financed by TVA or REA and in some cases had been constructed with labor donated by CWA. (See pp. 75-79, *supra.*)

All of these factors, taken in connection with the unlimited character of the undertaking, are of the utmost importance in measuring the extent of the threatened invasion of the powers of the States and of the rights of the people; for inescapably, to the extent that TVA occupies the field, both the powers of the States and the rights of the people are displaced and destroyed.

Regulation by TVA of Rates of Existing Utilities Not Distributing TVA Power and Displacement of State Regulation. Not only the natural and reasonable effect, but the direct, necessary and intended effect, *of the Act and of the TVA Unified Plan* in the situation in which they operate, is to regulate the rates of all other utilities not distributing TVA power and operating in the TVA area. The statutory and administrative provisions for the regulation of the rates of distributors of TVA power is an integral and essential part of the statutory and administrative scheme to regulate all local electrical rates in the TVA area, including the rates of non-distributors of TVA power. (See analysis of statute, pp. 14-17, *supra.*) It is apparent that the standard contract provisions, prescribed and established in advance of any negotiations for sale of TVA power to, or through, municipalities and non-profit associations (fixing as they do what the ultimate consumer

shall pay in every classification of service, how his payments shall be collected and accounted for, and when collected, how they shall be expended and used) have no relation to the disposal of federal property and can have no object other than the establishment of a system of federal control over every operation in the electric power business. Such intention was affirmed by the TVA Directors themselves in their Minutes of October 13, 1933 [1] (excluded by the court as immaterial), and is borne out by all of their subsequent acts in the promotion of a market for the sale of TVA power.

The statute is specifically directed to bring about the sale of electricity in the territory "at the lowest possible rates" (Sec. 11) and specifically authorizes direct service by TVA where it "deems existing rates unreasonable." (Sec. 10.) Thus the threat of economic destruction hangs over the heads of the non-conforming. In this connection the vast size of the enterprise authorized by the Act and of the enterprise embodied in the TVA Unified Plan is again of controlling importance. It is plain that with electricity offered for sale in an amount which is unlimited in relation to the available market, a supply far greater than the demands of the area, at subsidized rates far below the rates of appellants under State regulation, the appellants can sell and continue in business at all only by adopting the rates from time to time promulgated by TVA and

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[1] "For the Authority's operations to provide a yardstick of public operation by which to measure private operations it is essential that the Authority engage not only in the generation but participate in the transmission and distribution of electricity, since these latter two phases of electric service represent the most important part of the cost of such service. A public yardstick to have value necessarily means public operation from power house to consumer's premises. (*It is for this reason that the Authority has adopted a policy of rate and accounting control of municipal distribution operations.*)" (TVA Minutes of October 13, 1933; Comp. Ex. 708, excluded, R. 3640.)

not by collecting the rates fixed by State authority. (See pp. 80-81, *supra*.) As this Court said in the *Walla Walla* case, *supra*, the public "would naturally take their water (electricity) where they could procure it cheapest." (loc. cit. 11.) The Federal Government can no more deny the intent to achieve, or the responsibility for achieving, a result flowing necessarily and inevitably from the operation of a statute upon an economic law, than it could deny an intent to achieve, or responsibility for achieving, a result naturally and inevitably flowing from the operation of a statute upon a law of nature.

The regulation of the rates of appellants and other utilities in the TVA area at the level fixed from time to time by TVA will be the natural and inevitable effect of that stage of the execution of the statute which will be represented by the completion of the TVA Unified Plan. This is patent from any consideration of the size of the enterprise in relation to the market (see pp. 80-81, *supra*) and of the circumstances that this unlimited quantity of electricity is being offered at rates conceded to be "substantially below" (and as shown by evidence excluded by the trial court as immaterial, from 25 to 60 per cent below) the state-regulated rates. While the trial court excluded, as immaterial, testimony of experts in the utility business that the operation of the TVA Act and of the TVA Unified Plan will directly and definitely so regulate appellants' rates, the uncontradicted evidence leaves no room for doubt on that point.

The court also excluded evidence that the appellees are so construing and administering the Act and the TVA Unified Plan. Thus the court excluded, as irrelevant, an official TVA Press Release stating in the words of Director Lilienthal:

> "The power policy written into the Tennessee Valley Authority Act represents an attempt to regulate public

utilities not by quasi-judicial commissions, but by competition." (Comp. Ex. 815, excluded, R. 3732.)[1]

While apparently admitting, as they must, that *de facto* the TVA Act and the TVA Unified Plan will regulate and fix appellants' rates, the appellees contend that that does not constitute regulation in law because neither the Act nor the TVA Unified Plan provides a penalty by fine or imprisonment for failure to adopt rates promulgated from time to time by TVA. The contention is plainly without substance in law or in fact for the following reasons:

First: The court below in its opinion referred to "the inevitable effect of the lower rates of the TVA within this area and the economic necessity forced upon the complainants of lowering their rates to meet the competitive rates of the Authority * * *." (R. 555.) The appellants must accept the rates promulgated by TVA or

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[1] This was not an isolated instance of this declaration of the administrative interpretation and administration of the Act. Other illustrations (out of a very large number published in official TVA Press Releases, all of which were excluded by the court as immaterial), are:

"Regulation by Commission had in many states proved ineffectual. * * * And so, to supplement regulation by Commissions, Congress passed the TVA Act." (Comp. Ex. 799, excluded, R. 3698.)

"The National Power Policy of the President and the Congress, written into the Tennessee Valley Authority Act, recognize that electric power, next to the soil, is our greatest resource. * * * And so, to supplement regulation by Commissions, Congress passed the Tennessee Valley Authority Act. * * * We believe that definite plans of the Authority now in process of execution afford the quickest means of accomplishing a thorough revision of rate schedules and rate theories throughout the country, and with it, an increase in the use of electricity. This is an essential part, as I see it, of the new national power program inaugurated by the Tennessee Valley Authority Act." (Comp. Ex. 800, excluded; R. 3703, 3707; see also Comp. Exs. 790, R. 3683; 796, R. 3691; 839, R. 3773.)

suffer the complete loss of their business and economic destruction. This control over the rates of appellants and other utilities in the area is plainly effected by economic coercion. Regulation effected by economic coercion is no less regulation than when effected by fine or imprisonment; and if the subject over which federal regulation is achieved through economic coercion does not fall within the field of federal regulatory power, such regulation is unconstitutional. *United States v. Butler*, 297 U. S. 1, 70-1.

Obviously, the regulation of appellants' rates under the TVA Act and under the TVA Unified Plan is much more direct, definite and certain, and the economic consequences of non-conforming are much more disastrous under the TVA Act and under the TVA Unified Plan, than was the regulation of the production of unwilling farmers under the Agricultural Adjustment Act. Regulation of the electric industry so as to bring about the sale of electricity "at the lowest possible rates" is the very heart of the TVA Act, just as the regulation of production was the heart of the old Agricultural Adjustment Act. And manifestly, the offer to purchase federal control of local electric rates with *unlimited amounts of subsidized power*, with *gifts* and *loans (repayable, if at all, only out of earnings)* for the construction of systems to distribute TVA power, *with loans carrying no personal obligation* to non-profit organizations for the construction of systems to distribute TVA power and with the *donation* of labor by the CWA (see pp. 75-82, *supra*), greatly exceeds the economic power and coercion exerted by the machinery provided for purchasing control of agricultural production under the Agricultural Adjustment Act.

Second: To say that the rates of existing utilities are not regulated upon the ground that they might stubbornly and wilfully choose destruction rather than submit to such federal regulation would be to remove the law from

the field of common sense and realities. It would be to place constitutional rights at the mercy of the disingenuous scrivener, the clever scheme, the sharp practice.

It has long been settled that to offer a citizen the choice between the rock and the whirlpool, between submission to unconstitutional regulation and economic destruction, is not the open sesame to the avoidance of constitutional limitations and that under such circumstances the citizen may restrain the unconstitutional exercise of power which he could only avoid by submitting to his own destruction.

Thus, in *Frost v. Railroad Commission*, 271 U. S. 583, the effect of a State statute was to compel private carriers for compensation to submit to regulation as public carriers or to cease to use the highways entirely. It was argued that the private carrier was not obliged to submit himself to the condition for he had a free choice. In dealing with this argument, this Court said:

> "If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.*" (loc. cit. 593.)

This regulation of appellants' rates is plainly forbidden by the Fifth Amendment for several reasons. It is a field in which the Federal Government has no jurisdiction. It establishes appellants' rates at a confiscatory level. It

fixes appellants' rates without hearing, appeal or review. And apart from these violations of the Fifth Amendment, there is manifestly an unconstitutional delegation of power to TVA, as there is no adequate standard set up in the Act and no reasonable statutory method for the determination or review of the rates prescribed. Cf. *Panama Refining Co. v. United States,* 293 U. S. 388; *Schechter Corp. v. United States,* 295 U. S. 494.

Third: If it could be held (as we think it can not) that the *de facto* regulation by TVA of the rates of the appellants does not constitute regulation in law, that would not remove the vice in this aspect; for it clearly prevents the State from exercising its power of regulation. We have already seen that through subsidies and even through disregard of the statutory direction to sell the electricity at rates above cost after allowing for the benefit of the statutory subsidies (see pp. 79-80, *supra*), TVA has established rates conceded to be "substantially below" the state-regulated rates. The court excluded proof that these subsidized rates are in fact from 25 to 60 per cent below such state-regulated rates. The trial court states (Opinion R. 555), and the facts inescapably establish, that the appellants must adopt the rates from time to time promulgated by TVA. The result is that the rates of appellants are to be regulated below a fair return upon the property devoted to the public use.

Since the States, in regulating utility rates, are by constitutional limitation required to allow a reasonable return, it is obvious that there is nothing which the States can do in the premises and that their power of regulation is completely ousted. To deny that there is a displacement of the jurisdiction of the State because the States may retain in form of law a power to regulate rates, which action of the Federal Government has in fact made it impossible

for them to exercise, would be to make a farce of the law and of our constitutional system. Plainly the necessary and inevitable result of the operation of the Act and of the TVA Unified Plan is to substitute federal regulation of the rates of privately owned utilities in the area for State regulation under constitutional limitations. Further, the inevitable effect of the operation of that plan is to prevent existing utilities from reducing fixed costs through refinancing and to prevent them from raising necessary capital at reasonable rates, if at all, for extensions. (See pp. 83, 88-89, *supra*.) These are obviously direct and substantial interferences with proper and efficient State regulation.

While the court excluded the evidence as immaterial, the appellants below offered to show that the savings which could be achieved by the appellants from refinancing alone, in the absence of the disastrous threat of TVA competition and regulation, would be on the order of millions of dollars (see pp. 88-89, *supra*); and obviously such savings would be passed on to the consumers in any rate proceeding before a duly constituted State body. We have already pointed out that one of the effects of the TVA Unified Plan, as it is being executed, is to dismember the highly integrated and efficient systems built up by the appellants by seizing the hearts of their markets and the cream of their businesses (such as Chattanooga in the case of The Tennessee Electric Power Company) and destroying the economy with which the service could otherwise be supplied to the public. (See pp. 84, 88, *supra*.) In some instances this dismemberment threatens some of appellants with bankruptcy unless they choose to abandon what they believe to be their constitutional rights and are concurrently able to sell their facilities to TVA,—and that sorry alternative is made more desperate still by the fact that the price offered by TVA must be accepted upon pain of duplication and de-

struction.[1] *Under such circumstances the power of the State fairly and constitutionally to regulate rates, to order extensions of service, to compel continuation of service, to establish uniform State-wide rates and otherwise to adopt policies deemed to be for the general welfare and prosperity of the State is set at naught.*

In the court below it was argued that the decision of this Court in the *Ashwander* case sustained the power of TVA to regulate rates. It seems sufficient to say that the opinion in the *Ashwander* case discloses no consideration, and much less any approval, of the claimed right of TVA to regulate rates; but on the other hand, the opinion of this Court in the *Ashwander* case does clearly establish that any invasion of the powers of the States or of the rights of the people by TVA is beyond the constitutional power of the Federal Government.

4. The TVA Act establishes, and TVA under the Unified Plan is carrying out, a policy of having the local electric business carried on by public bodies or non-profit organizations.

(a) The TVA Act, without regard to State policy, affirmatively and in detail provides for the establishment of a policy of having the local electric business carried on by public bodies or non-profit organizations. (See analysis of Act, pp. 14-17, *supra.*) The Act requires TVA to "give preference to States, counties, municipalities and cooperative organizations • • • not organized or doing business for profit." (Sec. 10.) TVA may enter into contracts for a term of thirty years with public bodies or non-profit organizations (but not with corporations or persons doing a utility business for profit) provided they will build

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[1] See statement of Chairman A. E. Morgan before Congressional Committee, Comp. Ex. 109†, pp. 162-3, R. 2633-4; also R. 1127, 1135.

transmission lines to TVA generating stations or transmission lines. (Sec. 12.) Indeed, the Act requires that all contracts for the sale of power to private companies or persons doing business for profit, which power is to be resold for profit, shall contain a cancellation clause so that TVA may recapture the power for use in promoting the statutory policy of having the local electric business in the several States carried on by public agencies or non-profit organizations. (Sec. 10.) Plainly sales to persons doing a utility business for profit are, under the statute, only a temporary expedient to be used to dispose of power not otherwise saleable pending the establishment of this statutory policy.

Further to forward this policy, TVA may extend credit for a period not exceeding five years to public bodies and non-profit organizations situated within transmission distance from any TVA generating station to acquire existing distribution facilities and incidental works, including generating plants and interconnecting transmission lines (Sec. 12a) and for that purpose may issue bonds in the amount of $50,000,000 on the credit of the United States. (Sec. 15a.) *The statutory purpose to establish this policy within the States could not be written more plainly on the face of the Act.*

When these provisions of the Act are read in the light of the fact that under the statute quantities of electricity unlimited in relation to the available market are to be offered for sale at subsidized rates with which no unsubsidized competitor can compete, it is plain that the establishment of such a policy within the States is *not only the natural and reasonable effect, but the inevitable effect, of the operation of the Act.* It follows under economic law that "citizens would naturally take their water (electricity) where they could procure it cheapest." *Walla Walla City v. Walla Walla Water Co., supra.* And as before pointed

out, *Congress can no more disavow a result inescapably following from the operation of a statute on an economic law than it can disavow a result inevitably following from the operation of a statute upon a law of nature.*

(b) TVA, as it must, has followed this statutory policy. While the trial court excluded the evidence as immaterial, the appellants offered to prove that privately owned and operated utilities had repeatedly offered to purchase the power being generated and to be generated under the TVA Unified Plan at a price fixed by competitive bidding, by arbitration or by the published rate schedule of TVA and to pass on any saving to the public. (Offer to Prove, Willkie R. 1505-7.) While only a small fraction of the total power capacity which will result from the completion of the TVA Unified Plan has yet been achieved, TVA has developed its power capacity far beyond the demand of its current customers due to the fact that it has taken some time to construct duplicate transmission and distribution systems or force the sale of existing distribution systems. In the meantime it refuses to sell power to privately owned utilities except with provision for recapture for use in promoting the statutory policy of having the local electric business carried on by public agencies and non-profit organizations in accordance with the provision of the Act to which reference has been made. That under the TVA Unified Plan appellees are acting to establish this statutory policy is therefore not open to debate.[1]

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[1] The effectiveness of the operation of the statutory and administrative scheme to have local electric business carried on by public bodies and non-profit organizations is strikingly illustrated by the situation in the territory served by the appellant Alabama Power Company which, to avoid duplication of testimony, was taken as typical. (R. 936, 965.) During the period between 1915 and 1930, thirty-three municipalities operating their own electric distribution systems voted to sell such systems to the Alabama Power Company and no municipality voted to acquire a distribution system for municipal operation. (R. 941, Comp. Ex.

(Continued on page 178)

5. There is no real or substantial relation between the power to dispose of federal property and the regulation of local electric rates or the establishment within the States of a federal policy of having the local electric business carried on by public or non-profit organizations.

The regulation of retail rates and federal control over the method of carrying on the local electric business is obviously unnecessary to the disposal of federal property. No justification appears except the desire to impose federal regulation and control over the local electric industry. (See pp. 138-139, *supra.*) No honest reading of the statutory scheme of disposal can result in a conclusion that it is merely a method of getting the property to market. In fact the provisions of the Act provide a limitation on the market. The method of disposing of the property provided by the Act is a method of promoting public or non-profit operation of the local electric business and federal regulation of that business. The very provisions of the Act which contrive to govern the concerns reserved to the State, likewise limit the market for the sale of power. It is not a market in which all buyers may participate on equal terms. And the TVA Unified Plan establishes in operation those statutory purposes.

6. The natural and reasonable effect of the operation of the Act, by bringing about a federal monopoly of the local electric business, is to deprive the States of important tax revenues.

It has long been an established principle of constitutional law that the Federal Government may not exercise its power of taxation so as substantially to burden or interfere with the functions of the States. *Collector v. Day,*

186, R. 2967-8.) Since the passage of the TVA Act in 1933, 18 municipalities, 13 of which received service from The Alabama Power Company, voted to acquire electric systems. Of the 13, 6 are now buying their electric requirements from or are under contract to buy from the TVA. (Comp. Ex. 191, R. 3001; R. 948.)

78 U. S. (11 Wall.) 113, 124; *Pollock v. Farmers Loan Co.*, 157 U. S. 429, 584; *Ambrosini v. United States*, 187 U. S. 1.

While the recent decisions of this Court in *Helvering v. Gerhardt*, 304 U. S. 405, and *Allen, Collector, v. Regents*, 304 U. S. 439, may be regarded (although we think it doubtful) as requiring a plainer showing of interference with State functions through exercise of the federal taxing power than had been the previously established rule, it seems plain that nothing in those decisions sanctions any substantial interference with or burdening of State functions through the exercise of the taxing power. And it would seem that if the traditional doctrine that the Federal Government may not use its power of taxation so as substantially to interfere with or burden State functions is not to be abandoned, the adoption by the Federal Government of a systematic course of conduct, which has the direct and necessary effect of depriving the States of large sources of taxation and revenue, must be equally inadmissible. Manifestly, if the Federal Government may take over vast industries within the States and operate them as federal monopolies, the tax resources of the States will in a large measure continue to exist only at sufferance of the Federal Government. The record here shows that in 1937 the 18 original appellants alone paid approximately $16,000,000 in taxes and the larger part of these taxes was paid to States and state agencies. (See p. 62, *supra*.) The inevitable effect of the operation of this Act is substantially to deprive the States of that source of taxation and of that important revenue.

H.

The objection that the statutory and administrative scheme for the disposal of the electricity is unauthorized by the Constitution and contravenes the Fifth, Ninth and Tenth Amendments cannot be cured by the consent of a State; and were the question one of release from inherent constitutional limitations, they could not be surrendered in the vital characteristics here involved except by constitutional amendment.

TVA denies the right of the States to exercise any power or control whatsoever over its business and activities. (See pp. 80-81, 164-166, *supra.*) Nevertheless six states, doubtless moved by the prospect of large federal expenditures or of distribution of electric power at rates subsidized by the Federal Treasury (Cf. *Butler v. United States, supra*), passed statutes exempting TVA from State regulation as a public utility or purporting to authorize municipalities and cooperative associations to distribute TVA power.[1] In Alabama and Tennessee these statutes were in varying degrees involved or mentioned in certain cases before the highest courts of those States. *Chattanooga v. Tennessee E. P. Co.*, 172 Tenn. 505; *Memphis P. & L. Co. v. Memphis*, 172 Tenn. 346; *Tennessee P. S. Co. v. Knoxville*, 170 Tenn. 40; *Alabama P. Co. v. Membership Corp.*, 234 Ala. 396; *Oppenheim v. Florence*, 229 Ala. 50. TVA was not a party to any of these cases, and in none of them did the court purport to pass upon the validity of the TVA Act or of TVA activities. In none of these cases was the validity of TVA regulation of rates of private utilities involved or considered. Nor did the courts in any of these cases pass upon the validity of TVA interference with the

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[1] Such statutes were passed in Alabama, Mississippi, Tennessee, Kentucky, North Carolina, and Georgia. These statutes are printed in the separate Appendix to this brief, pp. 47-66.

sovereign functions of the States in regulating local electric rates or the electric business generally. In each case the court assumed that the State police power must continue unimpaired.

However, the trial court, after citing the foregoing cases, said:

> "The actions which the complainants attack are authorized by the states themselves. It is strange doctrine that acts authorized by a sovereign state constitute interference with its sovereign rights because of the fact that they are also authorized by the Federal Government. We think that deliberate cooperation between the state and the United States, authorized in each case both by the state legislature and by the Congress, constitutes no abdication of any state right." (R. 563.)

Apart from the fact there there is no pretense of State consent in three of the States involved,[1] the trial court misconceives and misstates the point. There was no contention that "acts authorized by a sovereign State" are unlawful, "*because* of the fact that they are also authorized by the Federal Government." The contention—which is not a "strange doctrine"—is that the Federal Government may not appropriate police powers of the States and may not do that even with the State's consent.

Nor is it the contention that constitutional federal action is made unlawful by concurrent State action in the same field. Where federal power is being constitutionally exercised, assent or non-assent by the State is immaterial. As this Court said in *Butler v. United States, supra,* "if the federal power reaches to the subject-matter, its exertion cannot be displaced by State action." (loc. cit. 74.) But the question here is whether action of the Federal

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[1] Virginia, West Virginia and South Carolina.

Government otherwise unconstitutional because in excess of the powers granted under the Constitution and in contravention of the Fifth, Ninth and Tenth Amendments is brought within the scope of federal constitutional power by State consent. More precisely the question here is whether a State may confer constitutional authority upon the Federal Government to engage in and monopolize the business of supplying electricity to the public in the State, regulate the local electric business and deprive the people of the right to engage in that business or, if they can remain in business at all, to carry it on free from federal interference or regulation. This is a question which was not raised or considered in the State cases relied upon by the trial court and in any event the question is one of federal law upon which the determination must be finally made by this Court. And if the State cases could be construed, as we think they cannot, as holding that absence of federal power may be supplied and violation of federal constitutional limitations may be excused by the action of a single State, the holding would plainly be grossly erroneous. The problem involves on the one hand the granting of powers to the Federal Government *which are not found in the Federal Constitution,* and, on the other, the *abdication of powers reserved to the States and the people and the surrender of rights retained by the people* under the Federal Constitution. Neither may be done under our dual system of government without constitutional amendment.

In *Ashton v. Cameron County Water Improvement District,* 298 U. S. 513, this Court said:

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. *United States v. Butler,* 297 U. S. 1. The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation." (loc. cit. 531.)

In *United States v. Butler*, 297 U. S. 1, 72, this Court said:

> "But if the plan were one for purely voluntary cooperation it would stand no better so far as Federal power is concerned. *At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.*"

And in *Carter v. Carter Coal Co.*, 298 U. S. 238, 295, this Court said:

> "* * * State powers can neither be appropriated on the one hand nor abdicated on the other."

There is an inherent lack of power in the Federal Government to "invade the rights reserved to the States or to the people" or "to govern the concerns reserved to the States." No want of federal authority can be supplied, no violation of federal constitutional prohibition can be cured by the consent of a State.

Here we have not a case of cooperation between the State and Federal Government in the exercise of their constitutional powers, *but a case of abdication by the State and usurpation by the Federal Government.* The situation is plainly distinguishable from that presented in *Steward Machine Co. v. Davis*, 301 U. S. 548. In that case the Federal Government was found to have the constitutional power to levy the federal taxes and to carry out the scheme of the statute. This federal power was not destroyed or limited by the cooperation of the States in the exercise of independent constitutional powers. The consent or cooperation of the State in the *Davis* case neither enlarged nor diminished the power of the Federal Government. That is the vital distinction overlooked by the trial court. While our constitutional system does not preclude the *cooperation* of the State and Federal Governments in the exercise of the constitutional powers of each, it does preclude the abdication of powers by the States and the usurpation

of powers by the Federal Government by collusion between them.[1] It does preclude the destruction or "disparagement" of the rights retained by the people by any action short of the amendment of the Constitution by constitutional processes.

But if it be assumed *arguendo* that the question here is whether the Federal Government may be relieved from the inherent limitations imposed by our dual system upon the exercise of its express powers by consent of a single State, the answer is equally plain. The limit of the doctrine that a State may, in some circumstances, by consent remove constitutional limitations upon the exercise of an express power, which exist only in the inherent limitations of our dual system of government, is that the States may not surrender the "essence of their statehood." *United States v. Bekins*, 304 U. S. 27, 53.

Here consent of the States requires that they shall strip themselves of their police power in one of the largest and most important fields of State government and that they shall delegate to the Federal Government their police power to regulate the business of supplying electricity to the public. This police power is inherent and involves the very essence of Statehood under our system of government. It has been consistently held by this Court that that power may not be abdicated or bartered away. *Northern Pacific R. Co. v. Minnesota ex rel. Duluth,*

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[1] In the court below the appellees made, and the trial court apparently accepted, the contention that there can be no federal invasion of State rights in the absence of interference with *affirmative regulation*. States may adopt a policy of non-regulation or a policy of most complete and detailed regulation. Thus, some States regulate rates of publicly owned utilities and some do not, but neither the conscious decision not to exercise, nor the inadvertent neglect to exercise, such State powers invites or permits the Federal Government to invade the States and exercise powers reserved to the States and forbidden to the Federal Government.

supra; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548; *Denver & Rio G. R. Co. v. Denver*, 250 U. S. 241. Nor may it be delegated to any other authority. *I Cooley's Constitutional Limitations*, 224 (8th Ed.)[1]; *Clark v. Washington*, 12 Wheat. 40. It has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139; *Slaughter House Cases*, 16 Wall. 36, 63; *Keller v. United States*, 213 U. S. 138, 144.

If the States may surrender that sovereignty, no reason is apparent why the States may not surrender the power to regulate all of their internal affairs for a price. And if that is so, then the Federal Government, by the use of federal funds or by gifts of federal property or by "sales" of federal property at less than cost or even at less cost than it is possible to produce them without the use of the credit of the nation, may acquire all of the reserved rights of the States,—and as those rights are successively purchased, the States will be progressively weakened and less able or willing to defend their rights or discharge their duties. *Carter v. Carter Coal Co., supra*, 296.

In *United States v. Bekins, supra*, there was involved no surrender of State police power to the Federal Government; no surrender of the "essence of statehood." There was involved only State consent to a single and non-recurring action involving a release of a political subdivision of

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[1] "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." (p. 224.)

the State which the State desired and was powerless to give. *Here is involved the surrender of State police power for twenty or thirty years and, under the inexorable force of indisputable facts, a surrender forever.* "Not by arguments so divorced from the realities of life" (Dissenting Opinion of Cardozo, *J.*, *Ashton v. Cameron County District, supra*, p. 541) has our dual system been preserved for 150 years. There is an inherent lack of power in both the Federal Government and the State Governments to violate the "foundation principles of our dual system of government."

Nor should the rights retained by the people be overlooked. They include the right to carry on an intrastate business free from federal interference or regulation and the right to engage in a lawful business *without being ousted* by the Federal Government making a legal or *de facto* federal monopoly of that business. We deny the right of a single State, or the right of any group of States (less than enough to amend the Constitution by constitutional processes) to empower the Federal Government to "disparage" the rights of the people and much less to destroy them. No State Government acting in collusion with the Federal Government behind the backs of the people may take away the rights reserved and guaranteed to the people by the Constitution. Back of the power of both the State and Federal Governments stands the people as sovereign. Certain rights were reserved not to the States but to the people, and those rights can be surrendered only by the people acting through constitutional processes.

I.

The principles laid down in the Ashwander Case condemn the method of disposal authorized by the Act and adopted by the TVA Unified Plan.

In the court below the appellees contended that the validity of the method of disposal authorized by the Act and adopted by the TVA Unified Plan is sustained by the decision of this Court in the *Ashwander* case. The trial court, as before pointed out, declined to consider whether the reserved powers of the States or the rights of the people were invaded, or whether the undertaking upsets our dual system of government. Having thus disregarded the controlling limitations upon the power to dispose of property which were laid down by this Court in the *Ashwander* case, the trial court held that the *Ashwander* case sustains the disposal of property under examination because the *Ashwander* case involved "every kind of electric facility, many miles of distribution and transmission lines" and the continuous production of electric energy at Wilson Dam. (Opinion, R. 564.)

Thus a controlling point in the mind of the trial court was the *kind* of facilities rather than their extent or the effect of the undertaking upon reserved rights or upon our dual system of government. And even that statement was fundamentally unsound; for the transmission lines in the *Ashwander* case were only 44,000 volts, suitable for taking power to a small local market while here the large transmission lines are 154,000 volts (built for ultimate increase to 220,000 volts), *which are suitable only for the backbone of an immense electric system.* The *Ashwander* case only involved the purchase of facilities of very limited capacity and very limited extent. It did not involve any of the questions of rate regulation, substantial displacement of State police powers in the entire field of regulating the electric business, destruction of state-regulated agencies created to carry on this public service, or destruction of the right

of the people to engage in the business through displacement by a federal monopoly, all of which are present in this case.

The essence of the trial court's conclusion is that because this Court held in the *Ashwander* case that a "limited undertaking" (insignificant in comparison with the TVA Unified Plan or the power system authorized by the TVA Act) did not constitute an invasion of the rights reserved to the States and the people, did not upset the balance of our dual system of government, and did not constitute engaging in a business or industry, no method of disposal of property,—no matter how large, no matter what the effect upon the reserved rights of the States or the people, no matter whether it is branded inescapably as a competitive commercial enterprise by the mere fact that it inevitably takes over the entire business or industry of supplying electricity to the public in a large part of seven or more States, —could violate any of these limitations. The mere statement of the proposition is sufficient to refute it.

As the Court of Appeals said in *TVA et al. v. Tennessee E. P. Co., et al.*, 90 F. (2d) 885, 890-1, R. 274:

> "The Ashwander case was a derivative suit brought by preferred stockholders of the Alabama Power Company to set aside the contract as *ultra vires*. By limitations imposed upon the Court by the nature of the suit, and through limitations of the judicial process, *the Ashwander case was kept within very narrow compass.*"

Both special counsel for TVA and the then Solicitor General insisted in the *Ashwander* case that since the transmission lines involved ran from Wilson Dam and the electric energy generated at Wilson Dam was more than sufficient to supply all of the requirements of the contract,[1]

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[1] Indeed when the contract was made and for more than two years thereafter, there was no other source of electricity available to TVA.

the questions properly before this Court were limited to the constitutional authority for the construction of Wilson Dam and for the disposition, as provided in the contract, of the electric energy there generated;[1] and this Court accepted that factual hypothesis as the basis of its decision. (*Ashwander* case, loc. cit. 326.) The sole questions thus were (a) whether TVA could lawfully generate electric current at Wilson Dam as it had been constructed under the National Defense Act, and (b) whether TVA could lawfully acquire the transmission lines (*limited in capacity and length*) involved in that contract to carry such current to a local market. These were the only questions decided by this Court.

To avoid any possible misconception of the scope of its decision, this Court said:

> "* * * We express no opinion * * * as to the status of any other dam or power development in the Tennessee Valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of the Authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Company." (loc. cit. 340.)

The Court of Appeals said in *TVA v. Tennessee E. P. Co., supra:*

> "* * * What then may have been merely tentative or speculative may now be approaching realization. What then was remote may now be imminent, and mere concept have fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of those complaining. This may only be determined by a full hearing on the merits." (loc. cit. 892, R. 277.)

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[1] This is apparent from the excerpt from the argument of the Solicitor General in this Court, which is printed in the separate Appendix to this Brief, pp. 67-69.

This statement of the Court of Appeals is abundantly sustained by the record. The record establishes that the stage of the execution of the TVA Act which is embodied in the current TVA Unified Plan involves the generation, transmission and distribution of electric power over an area embracing a large part of seven or more States and has so far progressed that the appellants are now face to face not merely with threatened subsidized competition,—already an accomplished fact,—but the appropriation of their businesses and the destruction of the value of their properties.

The execution of the statute has reached a stage which involves no "limited undertaking" but one so vast that it must be held beyond the constitutional power of the Federal Government or it must be held that the federal power to dispose of property does give the power to destroy the powers reserved to the States and the rights retained by the people, to upset the balance of our federal system and to engage in a competitive commercial business within the States. No intermediate ground remains; for as we have already shown, such is the inevitable effect of the TVA Unified Plan upon the rights of the States and the people, and upon our dual system of Government. If that stage of the execution of the statute involved in the TVA Unified Plan be not held to constitute an unlimited undertaking and be not held to be an unwarranted destruction of the reserved powers of the States and of the rights of the people in the field of supplying electric service to the public, then it is impossible to conceive of any undertaking of the Federal Government which is subject to those limitations.

POINT III.

THE RIGHT OF APPELLANTS TO SUE, IN THE SITUATION SHOWN ON THIS RECORD, IS PLAIN.

The opinion of the trial court, in so far as it bears upon the right of appellants to sue, states:

"* * * Whatever compulsion exists is the inevitable compulsion exercised by the fact that a *competitor* sells at lower rates than complainants. But if the *operation of the TVA is legal,* the complainants have no legal right not to be subjected to *such competition* even though it curtail or destroy their business. *Alabama Power Co. v. Ickes,* 58 S. Ct. 300, 82 L. Ed. ...., decided January 3, 1938." (R. 552.)

* * * * *

"In view of the inevitable effect of the lower rates of the TVA within this area, and the economic necessity forced upon the complainants of lowering their rates to meet the *competitive rates of the Authority,* we conclude that the record presents evidence of *substantial future damage* to these complainants. But such damage constitutes *damnum absque injuria unless sales of power by the TVA are unlawful.*" (R. 555.)

* * * * *

"* * * It therefore is essential to the decision of the case pleaded in the bill to determine the constitutionality of this statute." (R. 558.)

* * * * *

"Moreover, no State has intervened as a party in this proceeding to protest that its laws are violated by the TVA, and no regulatory commission is a party to this action. These complainants are not authorized to object on behalf of the states. *Georgia Power Co. v. Tennessee Valley Authority,* 14 F. Supp. 673, 676. Questions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court." (R. 563.)

With the exception of the novel rule laid down with reference to the right of a citizen to resist the exercise of federal power over him in matters reserved to the States (hereinafter discussed), these excerpts from the opinion below seem clearly to recognize the obvious right of the appellants to sue in all aspects of the suit. But subsequent to the filing of this opinion, the majority of the trial court adopted verbatim conclusions of law drafted and submitted by the appellees without opportunity to the appellants to comment upon them or point out that many of them are plainly erroneous, others argumentative, others half truths and others wholly inapplicable.[1] Cf. *Morgan v. United States*, 304 U. S. 1.

The appellees' conclusions, thus adopted by the majority of the court, state that appellants have no standing (1) to challenge the right of TVA to sell to (more accurately *through*) municipalities and non-profit cooperative organizations because such entities have a legal right to engage in the electric business under State law (Conclusions 53-54, R. 663); or (2) to challenge the right of TVA to sell directly to rural customers or industrial customers "not previously served by any of the complainant companies" for lack of proof of actual or threatened damage. (Conclusions 55-56; R. 663.)[2]

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[1] Gore, *J.*, declined to adopt the Conclusions of Law submitted by the appellees. (R. 572.)

[2] The arbitrary character of these conclusions readily appears from the following facts. The court throughout the trial repeatedly sought to restrict not only the scope but also the *quantum* of proof offered by the appellants on any issue and in particular pressed the appellants not to offer any further proof of damage upon the ground that the court thought the threat of damage to appellants obvious and would assume substantial damage. (R. 1259-60, 1266, 1414, 1470, 1483.) In each such instance, counsel for the appellees made no protest or objection.

Furthermore, the record disclosed the keenest competition between TVA and appellants operating in the areas where the partial execution of the TVA Unified Plan already had made TVA

(Continued on page 193)

And finally the majority of the trial court, in complete disregard of what they had said in their opinion, adopted the following Conclusion:

> "57. The complainant companies have no legal right to be free from competition, and they have no legal standing or right to challenge the statutory powers of the Authority to generate, transmit, and sell electric energy *in competition with them*, or some of them." (R. 663.)

This Conclusion is unsupported by principle or authority.

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power available. Indeed, one of the claims of appellees was that appellants had greatly accelerated their extensions of rural service in the areas in which TVA was offering such service. (R. 2147, 2149-52.) In the matter of industrial customers, the record disclosed the keenest competition (Add. Fdg. 117, R. 704), as illustrated by the competition for the business of the Monsanto Chemical Company (R. 955-6; 1503-4; Comp. Exs. 628, R. 3477; 118, R. 2828), Volunteer Portland Cement Company (R. 1133-5; Comp. Ex. 564, R. 3378; Def. Ex. 154°, p. 192), The L. N. Gross Company (R. 1031-2), The Victor Chemical Company (Def. Ex. 154°, p. 302) and The Aluminum Company. (Def. Ex. 154°, pp. 309, 313; Def. Ex. 147, pp. 4, 6.) This was all aside from the obvious fact (supported by evidence given by officers of the Alabama Power Company and omitted with reference to such of the other appellants as had not already offered proof on that point upon insistence of the court that the Alabama testimony should be taken as typical), that each of the appellants maintains a Sales Promotion Department which, among other things, is actively and aggressively engaged in attempting to sell electricity to companies now providing their own power by reason of ownership of pre-existing plants or by reason of by-product development of electricity and to secure the location of new industries in the territories served by them. (R. 936, 788, 801; see pp. 63-64, 83-84, *supra*.) Not only is the attempt to eliminate these phases of TVA activity upon the ground of failure to prove threatened damage unsupported and in the teeth of the record, but it can not be reconciled with a fair trial.

A.

One threatened with direct and special injury through the application of a federal statute or the act of a federal officer may maintain a suit to determine whether the statute is constitutional or the act is authorized.

It is an established principle that one threatened with direct and special injury—not common to the public generally—through the application of a federal statute or through the act of a federal officer, may invoke a judicial determination whether the statute is constitutional, or the act is authorized, by a suit for injunctive relief. *Frothingham v. Mellon,* 262 U. S. 447, 488; *Philadelphia Co. v. Stimson,* 223 U. S. 605; *Alabama Power Co. v. Ickes,* 302 U. S. 464. A citizen establishes his right to maintain such a suit if he is—

> "* * * able to show * * * that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally." (*Frothingham v. Mellon,* loc. cit. 488.)[1]

No better statement of the principle has been made than that found in *Philadelphia Co. v. Stimson, supra,* where this Court said:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is

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[1] The foregoing quotation omits the language "not only that the statute is invalid" which obviously is not a condition of the right to sue *but only a condition of the right to prevail*; for it is well settled that the constitutionality of a statute will not be determined except in a case where the complainant has a right to sue. Any other view would result in the circular reasoning that the right to sue may not be established without antecedent showing of unconstitutionality and that unconstitutionality may not be determined without antecedent establishment of the right to sue. If the citizen in addition to showing that he is threatened with direct and special injury, establishes that the statute is unconstitutional, he is entitled to relief upon the merits.

without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte Young,* 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property." (loc. cit. 621-2.)

Alabama Power Co. v. Ickes, supra, involved merely the application of this principle. No new principle was laid down. The case chiefly emphasizes that the challenged action must invade "a legal right" of the person seeking to maintain the suit. *Damnum absque injuria* is not enough.

It remains only to inquire what are the rights which the appellants seek to protect and whether they are invaded by the statute or the official action challenged in this suit.

B.

The legal rights of appellants which are invaded or threatened with immediate invasion.

The legal rights of appellants which they seek to protect are: (1) the right to be free from illegal competition and (2) the right to engage in and carry on the business of supplying electricity to the public within the States free from displacement by the Federal Government and free from federal interference, regulation or control.[1] These

[1] The appellants also have a right to be free from the injury or destruction of their going businesses through slander or libel of their businesses, from the injury or destruction of their businesses brought about by an illegal concert of action between federal agencies and from the injury of their businesses through sale of TVA power at less than cost. While these circumstances

(Continued on page 196)

rights are entitled to protection both from injury produced by the operation of an unconstitutional statute and from injury produced by unauthorized action of federal officials or agencies.

First: The appellants are severally engaged in the business of supplying electricity to the public under franchises (conceded to be non-exclusive for the purposes of this suit) granted by the States or their political subdivisions which have jurisdiction in the various territories in which appellants operate. (See pp. 61-63, *supra.*) A non-exclusive franchise is property. It is exclusive as against all persons attempting to engage in the business illegally, without a franchise or under a void franchise. It follows that, there being no adequate remedy at law, the holder of a non-exclusive franchise has a standing in equity to protect his property against such an injurious invasion.[1] This means that the holder of a non-exclusive franchise has a right to invoke a judicial determination of whether any

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[1] *Frost v. Corporation Commission*, 278 U. S. 515, 521; *Corporation Commission v. Lowe*, 281 U. S. 431, 435; *Alabama Power Co. v. Ickes*, 302 U. S. 464, 484-5; *City of Campbell v. Arkansas-Missouri Power Co.*, 55 F. (2d) 560, 562; *Gallardo v. Porto Rico Ry. L. & P. Co.*, 18 F. (2d) 918, 922; *Arkansas-Missouri Power Co. v. City of Kennett*, 78 F. (2d) 911; *Iowa Southern Utilities Co. v. Cassill*, 69 F. (2d) 703; *Kansas Gas & Elec. Co. v. City of Independence*, 79 F. (2d) 32.

(Continued from page 195)

have a material bearing upon other issues in the case, they also would appear to be violations of the TVA Act. The trial court declined to receive the evidence on these issues in so far as it was offered to show violations of the Act and did not consider or decided whether such activities violated the Act. For that reason they are not discussed in this brief in relation to their apparent violation of statutory authority except in so far as they are referred to in Point IV dealing with errors in procedure and in rulings on evidence. In Point IV they are discussed only to the extent necessary to show the materiality of the excluded evidence from the standpoint of violations of the statute as well as in relation to other issues in the case.

actual or threatened competition with him is legal and, if that involves the constitutionality of a statute or the existence of official authority, then a determination of the constitutional question or of the extent of the official authority. And for the purpose of determining the rights of appellants to sue, it must be assumed that the appellees are attempting to engage in the business illegally, without a franchise or under a void franchise.

Second: The appellants have a right to engage in and carry on the business of supplying electricity to the public within the several States subject only to State regulation and free from ouster, interference, regulation or control by the Federal Government. (See pp. 148-150, *supra.*) They have a right to be free from displacement or supersession in carrying on that business by the operation of federal statutes or the action of federal agencies which results in taking over the business as a federal enterprise. It is plain, therefore, that if the appellees are displacing or interfering with the appellants in the conduct of such business, or if the appellees are exercising federal regulation or control over the appellants' operation of such business, they are invading that legal right. And appellants have a standing to invoke a judicial determination whether that invasion is legal.

C.

The right of appellants to sue to enjoin actual and threatened illegal competition is clear.

It is plain that the appellees are severally threatened with the most severe and destructive sort of competition. That a threat of competition is a threat of irreparable damage is established by the decisions of this Court. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 12; *Frost v. Corporation Commission*, 278 U. S. 515, 521; *Alabama Power Co. v. Ickes, supra.*

The trial court in its opinion stated, with great moderation, that "*the record presents evidence of substantial future damage to these complainants.*" (R. 555.) The Opinion further states that:

> "* * * The Authority concedes that it sells, or intends to sell, power at substantially lower rates—residential, industrial and rural—than those of the complainants and *that some displacement of service will result.*" (R. 554.)

It is plain on the record that these statements, although conceding damages more than sufficient to sustain the right of appellants to sue, are gross understatements and that in fact the appellants are threatened with devastating subsidized competition, with duplication of their facilities and consequent injury to, if not destruction of, their value and in many instances with complete destruction of their businesses and the value of their properties. (See pp. 86-89, *supra.*)[1] Manifestly, the damage from the threatened competition in the case at bar is immeasurably more serious and destructive than that which threatened the complainant in *Frost v. Corporation Commission, supra*, or in *Walla Walla v. Walla Walla Water Co., supra.*

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[1] Damages arising from illegal competition include loss of business and markets, duplication and consequently destruction of value of facilities, loss of credit and inability to refinance or obtain new financing at reasonable rates, if at all. (See pp. 86-89, *supra.*) Damages arising from injury of appellants' going businesses through a campaign of misrepresentation among the customers of appellants to the effect that TVA rates fixed even below subsidized cost represent fair rates and that the state-regulated rates of appellants are unreasonable and unfair, and from confederation between PWA and TVA to compel existing utilities to sell facilities at prices fixed by TVA and retire from the field or suffer destruction of the value of their properties, also flow from competition, although it would seem that, as charged by appellants below, these activities are also violations of the TVA Act. The trial court did not consider or pass upon whether such activities violated the Act. However, such activities also sustain the right to sue.

It necessarily follows that the majority of the trial court erred when, in conflict with their opinion, they adopted appellees' Conclusion of Law 57 (R. 663) that appellants have no standing to challenge the right of appellees to "sell electric energy *in competition with them.*"

(1) The right to be free from illegal competition includes competition for future or unattached business.

The majority of the trial court, in complete disregard of its opinion, also adopted Conclusions of Law submitted by the appellees to the effect that appellants had failed to prove any damage in fact, actual or threatened, "resulting from the sales of power by the Authority direct to rural customers *not previously served by any of the complainant companies,*" or "resulting from the sales of power by the Authority direct to industrial customers *not previously served by any of the complainant companies*" (Conclusions 55, 56; R. 663.)

This anomalous holding, wholly unsupported by reason or authority, is that the holder of a non-exclusive franchise has no right to be free from illegal competition for unattached business. Manifestly the essence of competition is to secure the business of new or potential customers. It is in this very field that competition is necessarily the keenest. Thus, in *Frost v. Corporation Commission, supra,* this Court did not say that the appellant was only entitled to an injunction against the competition of the appellees for attached business, but that he was entitled to an injunction against the illegal competition of the appellees for any and all business then, or to become, available in the field of his operations. In the *Frost* case, this Court said:

> "That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by multiplying plants without regard to necessity *the effect well may be to*

deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced." (loc. cit. 523.)

The injurious effect of competition for new business is aptly illustrated in the instant record by the competition for the business of The Monsanto Chemical Company, The Victor Chemical Company, The L. N. Gross Company and others now served by TVA or under contract to use TVA power. The keen competition for the business of rural customers, a relatively new and gradually expanding field, is also plainly established in the record. (See footnote pp. 192-193, *supra*; R. 1056-8.)

The court further refers in its opinion and findings to the circumstance that the execution of the TVA Unified Plan had not yet reached a stage where power is already being sold in the territory of all of the appellants. (R. 551-2; Fdg. 111, R. 625-6.) If this were a suit for damages, one could understand the purpose of the observation, but its relevancy in a suit to prevent the consummation of that very wrong is difficult indeed to perceive. It also attaches some unexplained significance to the fact that some of the existing service of TVA is in the so-called "ceded area"[1] under the contract of January 4, 1934, between certain of the appellants and TVA. (R. 552.) The court apparently overlooks the fact that the contract of January 4, 1934, has long since expired according to its terms and that, assuming its validity in elements not involved in

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[1] The use of the term "ceded area" is highly significant and instructive. It suggests the first step in the creation of a new federal province, which is neither the United States nor any State, and in which the Federal Government will carry out in disregard of the laws of the States an experiment in social, economic and political planning heretofore unknown to our law. Of course, the so-called "ceded area" is insignificant in comparison with the area of existing and threatened power operations of TVA.

the *Ashwander* case, *neither the restrictions upon TVA* nor the privileges granted to TVA are any longer in force or effect in so far as they refer to competition for existing of new business.

(2) The right to be free from illegal competition includes competition for business handled by TVA through municipal and cooperative distributors.

The majority of the trial court further, and again in disregard of its Opinion, adopted Conclusions of Law that the appellants have "no standing or right to challenge the legal right of the Authority to sell electric energy at wholesale to municipalities and cooperatives." (Conclusions 53, 54, R. 663.) It must be remembered that for purposes of determining the right to sue, we must assume that the appellees are engaged in this branch of their business, as in all others, without requisite legal authority. It is plain that in engaging in this business (even if it be assumed that the municipalities and cooperatives are entirely free and uncontrolled entities, which we shall hereinafter show is not the fact), the appellees are in active competition with the appellants.

In such instances, TVA is supplying exactly the same commodity and serving exactly the same market as that previously served or previously and presently sought to be served by the appellants in the conduct of their business; and TVA is displacing the commodity and service of the appellants in their markets. If that is not competition, then competition as it has been known for hundreds of years must be redefined. In such instances the appellants are competing for the business of supplying such municipalities at wholesale with electric energy or for supplying the municipalities and their inhabitants at retail, or both. Plainly, every municipality which has, acquires or builds a distribution system without generating facilities is a potential cus-

tomer of the appellants.[1] Obviously, TVA, in undertaking to supply the requirements of a municipality which does not generate its own electricity, is competing with the appellants who are serving that territory under their statutory duty to serve. The fact that in such instances TVA sells wholesale and distributes through retail distributors does not avoid the fact of competition, nor does it destroy the right of the appellants to protect their businesses and properties against damages from illegal competition.

Citizens El. Ill. Co. v. Lackawanna & W. P. Co., 255 Pa. 145, is squarely in point. In that case the complainant had a non-exclusive franchise to supply electricity to the public in the township of Jenkins. The Jenkins Electric Company likewise held a non-exclusive franchise to supply electricity to the public in Jenkins Township, but possessed no generating facilities and hence had to purchase such electricity as it distributed from outside sources. The defendant Electric Company holding no franchise to carry on the business in Jenkins Township entered into a contract to supply the Jenkins Electric Company with electricity at wholesale. The court held that this constituted illegal competition by the defendant with the complainant and that the complainant was entitled to an injunction to restrain such wholesale supplying of the other company competing with the complainant under a valid non-exclusive franchise. Plainly this must be so.

Chicago v. Mutual Electric Light Co., 55 Ill. App. 429, involved the validity of a contract entered into by the Hyde Park E. L. & P. Co., holding a franchise to supply electricity to the public in a designated area of the City of

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[1] For example, Tupelo, Mississippi, before taking service from TVA, was a wholesale customer of appellant, Mississippi Power Company, and Athens, Alabama, before taking TVA service, was served at wholesale by appellant, Alabama Power Company. (Def. Ex. 143; R. 4192.)

Chicago, to sell electricity at wholesale to the Mutual E. L. & P. Co., which held a franchise to supply electricity in an adjoining area of the City of Chicago in which the Hyde Park Company held no franchise. In holding that this contract had the effect of extending the service of the Hyde Park Company into the territory for which it held no franchise and was therefore illegal, the court said:

"The right to furnish and transmit electricity is the essence of the grant. That alone is the public and useful end to be subserved. The poles, conduits and strung wires, are mere means to attain the useful ends accomplished by transmitted electricity." (loc. cit. 435.)

* * * * *

"Possessing this grant, and operating under it, the Hyde Park Company, by contract with another corporation possessing a like grant and privilege within another and different territory, connects its wires at the line where the territories of the two corporations meet, with the wires of the other corporation, and proceeds to transmit electricity over the wires of that corporation into territory within which it has no power to operate, *with the same effect and for the same purposes that it operates within its own territory.*

In every essential the doing of that is the same as if it had strung its own wires within that foreign territory and had transmitted electricity over them for the lighting and heating of, and furnishing power for, that territory.

Such is a most palpable evasion of the limitations of its grant and is a flagrant excess of the due exercise of its powers." (loc. cit. 436.)

(3) While the existence of such a relationship is not an essential of appellants' right to sue, the municipalities and cooperatives are in reality mere agents for the distribution of TVA power; and in any event, TVA so far controls and participates in the sales by distributors that the validity of its participation may be tested at the suit of an injured party.

Since it is plain that illegal competition includes competition for the business handled by TVA through municipalities and cooperatives, it is unnecessary to determine this question. However, were its determination essential to a determination of the right of the appellants to sue *in any aspect* of this suit, an analysis of the TVA contracts with its distributors would alone compel the conclusion that the municipalities and cooperatives are mere agents for the distribution of TVA power. While, as hereinafter pointed out, some of the criteria which the courts have considered in determining whether the relationship between a producer and distributor is one of agency are plainly inapplicable and without significance in the factual situation here involved, a consideration of the applicable criteria does, we think, establish that the relationship between TVA and its distributors is one of agency.

The Legal Criteria of Agency. The terminology employed in the contracts is not conclusive (*United States v. General Electric Co.*, 272 U. S. 476; *Mitchell Wagon Co. v. Poole*, 235 Fed. 817) and that would be particularly true where, as here, the municipalities and cooperatives are variously designated as distributors and purchasers. (Cf. Rules and Regulations, R. 2794-9, and section "Power Supply" R. 2773.)[1] While a reservation of title, or of a right to demand the return of the goods, in the producer may (but does not necessarily) establish the relationship

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[1] For brevity, hereinafter references to particular sections of TVA contracts are designated merely by the title of the contract section and a record page where it may be found, viz. "Power Supply" R. 2773.

as one of agency, the absence of either or both does not establish that the relationship is not an agency. *Mitchell Wagon Co. v. Poole,* 235 Fed. 817.

Control by the producer of the price at which the goods shall be sold by the distributor to ultimate consumers has always been regarded as strong evidence that the relationship between the producer and distributor is that of agency. *In re United States Electrical Supply Co.,* 2 F. (2d) 378; *In re Wright-Dana Hardware Co.,* 211 Fed. 908; *Rudin v. King-Richardson Co.,* 37 F. (2d) 637; *In re Smith,* 192 Fed. 574. The reservation of control by the producer over the terms on which the distributor sells, is also evidence that the relationship is one of agency. *In re Thomas,* 231 Fed. 513; *In re Kruse,* 234 Fed. 470; *John Deere Plow Co. v. McDavid,* 137 Fed. 802.

Another element considered by the courts in determining the nature of the relationship between a producer and distributor is whether the distributor is bound to pay for the goods supplied to him regardless of whether such goods are sold and, under the ordinary conditions of merchandising *tangible* goods, such an absolute obligation is frequently held to establish the relationship as one of sale and not of agency. *In re United States Electrical Supply Co.,* 2 F. (2d) 378. However, where the distributor does not pay the producer until he has sold the goods (usually such contracts provide that the distributor will make monthly payments for goods sold by him during the previous month), the relationship is one of agency or consignment rather than of sale. *Ludvigh v. American Woolen Co.,* 231 U. S. 522; *McCallum v. Bray Robinson Clothing Co.,* 24 F. (2d) 35; *In re Renfro-Wadenstein,* 47 F. (2d) 238. And, of course, where the arrangement merely amounts to a guarantee of collections, that is, when the distributor assumes the risk of non-payment by the ultimate consumers,

it is well settled that the relationship is one of agency *del credere*. *United States v. General Electric Co., supra.*

Requirements for monthly or weekly reports by the distributor evidence an agency relationship.[1] Control by the producer over bookkeeping methods and details of sales, reservation of rights of inspection, requirements for separate accounts of transactions relating to the producer's goods and requirements that the distributor shall purchase all of such goods handled by him from the producer (which is in effect that he shall not purchase from others), have uniformly been held to establish the relationship as one of agency and not of sale. *McCallum v. Bray Robinson Clothing Co.*, 24 F. (2d) 35; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1; *In re Renfro-Wadenstein*, 47 F. (2d) 238. In short, the reservation of control by the producer over the distributor goes far to establish that the relationship is one of agency.

Application of Pertinent Legal Criteria of Agency to the TVA Contracts. Under the TVA contracts delivery by the producer to the distributor is made only in the case of, to the extent of and simultaneously with, sale and delivery by the distributor to the ultimate consumer. That is, the distributor maintains no "stock of goods," but merely, as it were, withdraws the "goods" from the "warehouse" or supply of the producer when and as the distributor makes sale and delivery to the consumer. In this situation such criteria as "retention of title" or "right to demand return of the goods" are obviously inapplicable. However, when such of the foregoing criteria as are pertinent

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[1] *In re Renfro-Wadenstein*, 47 F. (2d) 238; *In re Thomas*, 231 Fed. 513; *McCallum v. Bray Robinson Clothing Co.*, 24 F. (2d) 35; *Rudin v. King-Richardson Co.*, 37 F. (2d) 637; *In re Warner-Quinlan Co.*, 86 F. (2d) 103; *In re Reynolds*, 203 Fed. 162; *Mitchell Wagon Co. v. Poole*, 235 Fed. 817; Cf. *United States v. General Electric Co., supra.*

in the situation are applied to the contracts between TVA and its distributors, it seems plain that such distributors are mere agents for the distribution of TVA power.

The distributor is obligated to take all electricity used or sold by it from TVA. ("Power Supply," R. 2730, 2773.) This, of course, is tantamount to a requirement that the distributor shall not distribute power from any other source. *Radio Corp. v. Lord*, 28 F. (2d) 257, 261.

The distributors are not obligated to make payment for energy delivered by the producer in any calendar month until the 15th day of the succeeding month, or 5 days after the receipt of a bill from TVA, whichever is the later. (Terms and Conditions "Billing," R. 2791.) The regulations imposed by TVA upon the distributors include a requirement that bills shall be rendered to ultimate consumers monthly and shall be paid within 10 days. (Rules and Regulations "Billing," R. 2796.) When these provisions are taken together, the effect is that the distributor is not obligated to remit to the producer until he has sold and collected for the goods delivered by the producer subject only to a liability for unpaid accounts as is usual in an agency *del credere*.

TVA fixes the price at which and the terms on which the distributor shall sell the energy to ultimate consumers. (Rules and regulations, R. 2794-9; "Resale Rates," R. 2731, 2766.) TVA prohibits the distributors from discriminating among customers ("Discrimination," R. 2777, 2815), and from selling electricity for sub-metering or resale. (Terms and Conditions "Sub-Metering," R. 2794.) In the case of cooperatives, it also prohibits the distributor from selling to any non-member unless such customer is approved by TVA. ("Non-Member Customers," R. 2767, 2822.)

The distributor is required to render a complete annual report to TVA in the form prescribed by TVA and

such other reports and information as TVA requests ("Reports," R. 2776, 2815) and to furnish promptly any operating and financial statements requested by TVA relating to the sales of electric energy. TVA prescribes the manner and method of bookkeeping and reserves the right at all times to inspect the books and records. The distributor is required to segregate the proceeds of the sale of electricity in a separate fund. (Terms and conditions "Accounting and Handling of Funds," R. 2787-8.) TVA requires that any of the distributor's employees who handle money shall be bonded. ("Bonding of Employees," R. 2769, 2815.) TVA also prescribes the manner in which the proceeds from the sale of goods shall be expended by the distributor. ("Disposition of Revenues," R. 2813, 2747, 2775.)

TVA prescribes the rules and regulations which the distributors must incorporate in any agreement with ultimate consumers. (Rules and Regulations, "Scope," R. 2799.) These regulations include such matters as applications for service, classification of customers, deposits from customers, standards for customers' wiring, inspection by the distributor, customers' liability for distributor's property, distributor's right of access to customer's premises, billing, termination of contract by customers, reconnection charges, discontinuance of service by distributors, service charges for temporary service, voltage fluctuations and additional loads, charges for non-standard service, meter tests and prohibition against resale by purchasers from distributors. (Rules and Regulations, R. 2794-9.)

TVA owns all of the property up to the point of delivery which is on the low voltage side of the sub-station. ("Point of Delivery," R. 2773, 2811.) TVA specifies how demand, energy and power factor shall be measured, how and when meters shall be tested, requires distributor's lines to conform to certain standards and reserves the right

of access to and inspection of distributor's property at all times. (Terms and Conditions, R. 2785-7.) TVA also supplies advisory services to Cooperatives in the problems of personnel and administration. ("Rendition of Advisory Services," R. 2768, 2814, 2826.) The contract is not assignable without TVA's consent. (R. 2732, 2827.)

A fair consideration of the arrangements between TVA and its distributors in the light of the facts on which they operate can, we think, leave no doubt that such distributors are mere agents for distribution of TVA power.

Liability of Appellees to Suit is not Dependent Upon Existence of Technical Legal Agency. Laying to one side *arguendo* the controlling fact that TVA sales through municipal and cooperative distributors are plainly competition by TVA with the appellants (see pp. 201-203, *supra*), the right of a person damaged by such action to test the validity of such TVA activities is not dependent upon the establishment of technical legal agency. In determining the right to sue, the question is not what is the precise legal relation through which the federal power is brought to bear, but whether in fact the federal agency has so far associated itself with, participated in, controlled or directed the activities damaging the citizen that it must be held accountable and required to justify its acts at the suit of the citizen. The foregoing review of the contract relations of TVA with its distributors, as well as other facts previously discussed, inescapably establish that TVA has not only completely associated itself with and fully participated in these activities but has also instigated, directed and controlled them. These circumstances plainly establish appellants' right to sue apart from their undeniable right to sue because TVA is in direct competition with them for this business. (See discussion of *Alabama Power Co. v. Ickes*, pp. 211-214, *infra*.)

D.

There is a clear right in appellants to sue to vindicate their right to engage in and carry on the local electric business free from federal interference, regulation or control and without being displaced by the Federal Government taking over the business.

We should not have thought this point open to discussion had not the trial court announced the novel doctrine that a citizen may not challenge the federal regulation or destruction of his business or legal rights, where or to the extent that the unconstitutionality of the federal action rests upon an invasion of the powers reserved to the States, even though the same action also invades the rights reserved to or retained by the people, but that the constitutionality of such statutes or action can be challenged only by the State. (R. 563.) Among the rights reserved to and retained by the people are the right of local self-government and the right to carry on local intrastate businesses (1) without being displaced by the Federal Government taking over and carrying on such businesses as federal enterprises and (2) free from federal interference, regulation or control. (See pp. 148-150, *supra*.) When either of these rights are invaded, the rights of the people are invaded although the same act may involve an invasion of the reserved powers of the States.[1]

Thus, no one would doubt the right of a utility to maintain a suit to enjoin actual or threatened federal regulation of its intrastate rates either on the ground that federal

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[1] Damages arising from invasion of this right include ouster of appellants from the business or occupation of supplying electricity to the public, regulation of appellants' rates by a Government without jurisdiction in the premises, vast losses through regulation of appellants' rates to a confiscatory level and the injurious effects of the imposition of a federal policy of having the local electric business carried on by publicly owned and nonprofit organizations.

regulation would be unconstitutional for lack of jurisdiction, or on the ground that the particular regulation would be confiscatory. And the right to maintain the suit would not be affected by the fact that the regulation would also invade the reserved powers of the States. But it is unnecessary to labor the point. There is no peculiar rule applicable to cases where the unconstitutional character of federal action rests upon an invasion of powers reserved to the States. That a private interest, individual or corporate, may sue where its legal rights are invaded by federal usurpation of State powers has been uniformly sustained by this Court. *United States v. Builer*, 297 U. S. 1; *Carter v. Carter Coal Co.*, 298 U. S. 238; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20; *Hammer v. Dagenhart*, 247 U. S. 251; *Hill v. Wallace*, 259 U. S. 44.

E.

The right of appellants to sue is clear under the decision of this Court in Alabama Power Co. v. Ickes.

The appellees below contended, and the trial court apparently assumed, that the decision of this Court in *Alabama Power Co. v. Ickes*, 302 U. S. 464, precluded or, at least, greatly restricted the right of appellants to sue.[1] That the ruling of this Court in the *Alabama* case neither limits nor forecloses the right of appellants to sue is, we think, plain. *On the contrary, the instant case presents the precise antithesis of the circumstances which this Court deemed controlling in the Alabama case, and under that decision the right of appellants to sue is plain and undeniable.* This readily appears from a comparison of the circumstances set forth by this Court as controlling in its

[1] After the decision of this Court in the *Alabama* case was handed down during the course of the trial of this suit, the presiding Judge *sua sponte* announced, without hearing argument upon the point, that her mind was closed on the question. (R. 2165.)

opinion in the *Alabama* case and the factual situation existing in this suit with relation to the same points.

In the *Alabama* case the statute did not authorize the appellees to engage, and the appellees were not engaging or threatening to engage, in competition with the appellants. Here the TVA Act authorizes, if it does not command, the appellees to engage, and they are actually engaging and threatening further to engage on a greatly enlarged scale, in competition with the appellants. (See pp. 159-162, 12-20, 65-90, *supra.*)

In the *Alabama* case there was no effort or purpose to regulate plaintiff's rates or electric rates generally. (loc. cit. 477.) Here the regulation of appellants' rates and of local electric rates generally throughout a vast area is an integral part of both the statutory and administrative schemes. (See pp. 167-169, 14-17, 80-82, *supra.*)

In the *Alabama* case "the expenditures under the statute involved no purchase of, nor contract for, regulation by the United States." (loc. cit. 477.) Here both the statutory and administrative schemes provide expressly for the regulation of the rates and other terms and conditions of service of distributors of TVA power by contract and for regulation of appellants' rates by offering unlimited supplies of federally produced electricity at prices far below the state-regulated rates of appellants. (See pp. 167-169, 14-17, 80-82, *supra.*)

In the *Alabama* case the defendants had "not reserved any right or power to influence or control rates to be charged by the municipal power plants." (loc. cit. 477.) Here the statute requires, and the appellees are in fact exercising, complete federal control of the rates of distributors of TVA power, municipal and otherwise. (See pp. 206-209, 14-17, 80-82, *supra.*)

In the *Alabama* case neither the United States nor the defendants had reserved any right or power under con-

tracts, or in any other way, to eliminate competition or to designate the person or agency from which the municipality should purchase power. (loc. cit. 477.) Here the intended, inevitable and natural effect of the operation of the TVA Act and of the TVA Unified Plan is to eliminate competition,[1] and the United States through the appellees does not merely reserve the right to designate from whom the power shall be purchased but expressly reserves the right to furnish all of the power. (See pp. 207, 80-86, *supra.*)

In the *Alabama* case neither the United States nor the defendants had any power or control over the operation of the projects after construction. Each municipality was "left entirely free from federal control or direction in respect of the management and control of its plant and business." (loc. cit. 478.) Here the United States, through the appellees, has reserved the most minute and complete control over the business and property of distributors of TVA power—a control so complete as to make them mere agents. (See pp. 204-209, *supra.*)

In the *Alabama* case there was no effort or purpose to foster public ownership of public utilities. (loc. cit. 477.) Here the heart of both the statutory and administrative schemes is to establish a policy of having the local electric business carried on by public bodies and non-profit organizations. (See pp. 175-177, 14-17, 70-76, *supra.*)

In the *Alabama* case there was no "effort on the part of the defendants to * * * cause injury or financial loss to the plaintiffs." (loc. cit. 477.) Here the effort of the appellees to seize the markets of the appellants and drive them out of business is undeniable.

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[1] While there is much other evidence in the record of the purpose and effort of the appellees to eliminate competition by appellants or any other utilities, this purpose and effort is strikingly illustrated by the advice of the appellee Lilienthal to the City officials of Chattanooga to eliminate competition with TVA power in that City by "taxing hell" out of The Tennessee Electric Power Company, one of the appellants. (R. 1048, 1085, 1087.)

In the *Alabama* case "there was no solicitation • • • on the part of any of the defendants, their agents or subordinates." (loc. cit. 477.) Here the record, even though the trial court erroneously excluded the best evidence on the subject, establishes aggressive solicitation of business and of agents to distribute TVA power by the appellees. (See pp. 70-76, *supra.*)

In the *Alabama* case there was no conspiracy. (loc. cit. 477-8.) Here the record, without evidence erroneously excluded, shows confederation between PWA and TVA to secure the business of appellants. (See pp. 76-79, *supra.*)

It is, therefore, apparent that the decision of this Court in the *Alabama* case neither precludes nor limits the right of the appellants to sue, but on the contrary, *sustains their right to sue in every aspect of this case.*

POINT IV.

UNLESS, AS WE BELIEVE, APPELLANTS ARE ENTITLED ON THE RECORD AS MADE TO A REVERSAL OF THE DECREE WITH DIRECTIONS TO ISSUE AN INJUNCTION, THEN THE DECREE OF THE TRIAL COURT SHOULD BE REVERSED FOR SERIOUS ERRORS IN MATTERS OF PROCEDURE AND IN RULINGS ON EVIDENCE.

Erroneous rulings of the trial court respecting the admission and exclusion of evidence, the forms of procedure and the conduct of the trial are so numerous and of such grave import that their cumulative effect was to deprive appellants of a full and fair hearing.

A. The trial court applied generally certain erroneous principles of law which permeated the entire trial and its rulings on matters of evidence and procedure.

The trial court undertook to "expedite" the hearing by limiting the scope and quantum of appellants' evidence, by insisting upon submission of successive phases of the case by successive specified dates, and by requiring that

oral arguments be held immediately upon the completion of the evidence and that proposed findings of fact and final briefs be submitted at the close of the arguments. (R. 1862, 1919-20, 2281-4, 2316, 2370-3.) Subsequently, contrary to its previous rulings, the trial court refused to disregard two fact briefs filed by the appellees, without leave, two days after final argument, and overruled appellants' motion to strike such briefs from the files. (R. 396, 565.)

These rulings are attributable primarily to an erroneous conception by the trial court of the requirements of the Act of Congress of August 24, 1937, (50 Stat. 751-2, Sec. 3; 28 U. S. C. 380a) that the "hearing upon any such application * * * shall be given precedence and shall be in every way *expedited* and be assigned for hearing at the earliest practicable date." Manifestly, the statute only directs that this type of case be brought on for hearing with a minimum of delay and is not susceptible of the interpretation (R. 2282-3, 2390) that the hearing itself shall be rushed to a premature conclusion without due deliberation or regard for accepted rules of evidence and forms of practice and procedure. It cannot be supposed that Congress ever intended by this statute to direct that important constitutional cases should be disposed of on hasty and immature consideration or without receiving all competent and material evidence bearing upon the constitutionality of its acts.

The effect of the trial court's rulings was to deprive appellants of their right to make a full presentation of their case and to deny them the opportunity to examine and reply to the appellees' proposed findings of fact which, with one minor exception, were ultimately adopted by the majority of the trial court. The fact that the findings are incomplete, often irrelevant, and based on erroneous conceptions of law is in no small measure due to this circumstance. As this Court has recently stated, "the requirements of fairness (which are of the essence of due process in a proceed-

ing of a judicial nature) are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Morgan v. United States,* 304 U. S. 1, 19, 20. In the present case, the trial court consistently ignored the essentials of a fair hearing throughout the entire course of the trial and permitted "delusive interests of haste * * * to obscure substantial requirements of orderly procedure." *Duke Power Co. v. Greenwood County,* 299 U. S. 259, 268.

1. Before questions of constitutional law, both novel and of far-reaching importance, are passed upon, the facts essential to their decision should be definitely found by the trial court upon adequate evidence.

The trial court frequently departed from the usual procedure in an important constitutional case (or, for that matter, any case) and undertook, on rulings upon the admissibility or production of evidence, to decide ultimate questions of substantive law in the abstract, and, having prematurely reached its decision on these points of substantive law by anticipation, the trial court would then "adhere" to its previous rulings and hold that the evidence offered or sought to be produced was irrelevant or immaterial. Many of these rulings were announced *sua sponte* before any evidence of the character or on the point involved had been offered.

The most sweeping ruling of this character was announced by the trial court (R. 904-9, discussed at pp. 238-240, *infra*) in denying appellants' application for a subpoena *duces tecum* (Comp. Ex. 1, R. 2441), in which the trial court undertook to limit the scope of the issues made by the pleadings by ruling that it would not receive any evidence relating to (a) certain activities, statements, proposed actions and objectives of TVA and its directors in the development and promotion of its power business; (b) the solicitation of appellants' customers by TVA; (c)

TVA's efforts to undermine and destroy appellants' businesses and property; (d) the confederation between TVA, PWA, REA and other federal agencies to promote public ownership and to supplant State regulation of the electric power industry by federal regulation; and (e) the rates charged by TVA and appellants and the substitution of TVA regulation for State regulation of appellants' rates. All the evidence which appellants later offered, which the trial court recognized as being in support of any of such issues, was excluded.[1]

Rulings of this character are in direct violation of the established doctrine of this Court that before questions of constitutional law, both novel and of far-reaching importance, are passed upon, the facts essential to their decision should be definitely found by the trial court upon adequate evidence. *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 548, 549; *City of Hammond v. Schappi Bus Line, Inc.*, 275 U. S. 164, 171, 172; *Borden Co. v. Baldwin*, 293 U. S. 194, 212, 213. In conformity with this principle the Circuit Court of Appeals on the appeal from the order granting the preliminary injunction in this case stated that "the ultimate rights of the plaintiffs should be decided only when the court is 'in possession of the materials necessary

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[1] Indeed, the trial court stated (ruling quoted p. 220, *infra*), that it had excluded certain of these issues more than six weeks in advance of the trial when the three-judge court first convened at Nashville to hear three motions that had been filed by appellants, i.e. (1) to produce and permit the inspection before trial of certain documents, drawings and maps of appellees (R. 327); (2) to require certain correspondence between TVA and REA to be produced or in the alternative to extend the time for taking testimony before the Special Master (R. 351); and (3) for leave to take the deposition of PWA Administrator Harold L. Ickes out of rule. (R. 343.) The court's rulings on these motions did not embrace any of the matters upon which the court stated in the above ruling it would receive no evidence (R. 374-6, 379-81) and appellants had no knowledge that any ruling had been made upon these matters until after the trial had commenced.

to enable it to do full and complete justice between the parties.' " (R. 278.)

In thus limiting the scope of the evidence, the trial court failed to recognize that a statute valid as to one set of facts may be invalid as to another (*Nashville, C. & St. L. Ry. v. Walters,* 294 U. S. 405, 415), and that the validity of many types of statutes must be determined by the manner in which they are administered, the facts upon or situation in which they operate and by their effect in actual operation. *Poindexter v. Greenhow,* 114 U. S. 270, 295; *Yick Wo v. Hopkins,* 118 U. S. 356, 373, 374; *Dobbins v. Los Angeles,* 195 U. S. 223, 240; *Norris v. Alabama,* 294 U. S. 587, 589; *Great Northern Ry. Co. v. Washington,* 300 U. S. 154, 161. Thus in *Retirement Board v. Alton R. Co.,* 295 U. S. 330, a full examination was made into the facts upon which the law operated to determine whether the purpose or effect of the statute there in question was to achieve purposes other than those delegated to the Federal Government by the Constitution.

From the discussion on the merits in earlier sections of this brief, it is plain that evidence falling into the five classifications embodied in this premature ruling of the court (see pp. 216-217, *supra*) had a material bearing upon substantial issues in this case. It therefore follows that the ruling, that no evidence falling within these classifications would be received by the court, was not only prematurely made, but also was plainly erroneous and highly prejudicial as excluding evidence, regardless of competency, which was properly admissible under the issues of this case which the court in this preliminary ruling misconceived.

Under well recognized rules of the law, any evidence which tends to support an issue between the parties is admissible. *Nelson v. United States,* 201 U. S. 92, 114; *Wade v. LeRoy,* 20 How. 34, 44. The court, in its attempt

to "expedite" the case, wholly disregarded this elementary principle.

B. The trial court erred in excluding evidence which was relevant and material to substantial issues of fact sought to be proved by appellants in support of their affirmative case on the merits.

To support various allegations in the Bill of Complaint that the generation of power is the primary purpose for which the TVA dams have been and are being constructed and that the method of disposition of the power is unlawful, appellants offered in evidence numerous Press Releases which had been *officially authorized, issued and published by TVA.* (Comp. Exs. 633, 634, R. 3487, 3490; 779-902, inclusive, R. 3673-3924.) Each of such Press Releases dealt with one or more of the following enumerated subjects:

(a) The wholesale, retail and industrial rates adopted and published by TVA applicable to all classes of consumers of TVA power;

(b) The progressive development of the TVA generating, transmission and distribution system;

(c) The purpose of TVA to construct and operate a vast electric generating and transmission system and to utilize the water power of the Tennessee River for that purpose.

(d) The primary purpose of various TVA projects to develop power.

(e) The purpose of TVA to construct and operate a vast federal electric utility system to serve the markets in which the appellant companies are now serving and offering electric service;

(f) The purpose of TVA to regulate the local rates charged by other electric utilities, including appellants, operating in the area;

(g) The assertions by TVA that its rates include all proper costs and that the rates of its competitors

are based upon improper capital write-ups, thereby representing that the rates of appellants are unreasonable;

(h) The assertions by TVA that the rates and practices of existing utilities, including appellants, are unreasonable and unfair, with the necessary and intended effect of destroying the going businesses of appellants and promoting the TVA power business;

(i) The solicitation of business, in areas served by appellants, by advertising the availability of TVA power, by advertising the availability of public funds through PWA, REA and other agencies to finance distribution systems for sale of TVA power, and by advertising the economies and savings to be secured by purchasers of TVA power;

(j) The threat and damage to the appellants and each of them from repeated announcements by appellees of their intended acts; and

(k) The refusal of TVA to submit to State laws or regulations in the conduct of its power business.

Long before any of these official Press Releases was offered in evidence, the trial court announced a ruling that it would not receive a variety of types of evidence, including Press Releases. Such ruling was made in connection with a ruling upon the admissibility of statements made by one of the appellees before a Committee of the House of Representatives in a Hearing upon a TVA appropriation bill.[1]

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[1] "JUDGE ALLEN: The Court has ruled upon this point at Nashville (i.e. that it would not receive in evidence speeches, releases to the newspapers, circulars or statements of TVA directors or representatives), the Court ruled again upon the point after the meeting at Nashville, the Court ruled upon this point upon arrival in Chattanooga, and the Court now rules upon this point, and it does so *in advance* in order that there may be no misunderstanding on the part of counsel and no waste of time to the inconvenience of all concerned, and you may have your exception." (R. 895.) By "in advance," the trial court meant in advance of the production of the documents in court and their offer in evidence and in advance of any argument. (R. 894-5.)

(R. 894-5.) Subsequently, the trial court excluded two Press Releases offered by appellants which embodied the announcement on August 25, 1933, of the TVA Power Policy (Comp. Ex. 633, R. 3487) and the announcement on September 14, 1933, of the proposed TVA wholesale and retail rates (Comp. Ex. 634, R. 3490). The sole ground for exclusion was that they were Press Releases and hence incompetent. (R. 1511.) Eventually, additional Press Releases (Comp. Exs. 779-902, R. 3673-3924), were offered by appellants and were all excluded by the trial court not as incompetent but as irrelevant and immaterial.[1] (R. 1532.)

When the substance of the things shown by these official Press Releases, as analyzed and enumerated at pp. 219-220, *supra,* is considered in the light of the issues of the case set forth and discussed in the portion of this brief devoted to the merits, it is plain that the relevancy and materiality of these excluded Press Releases appear on their face. Indeed, the ruling that they were irrelevant and immaterial was, significantly, made before the court had seen or examined them. (R. 894-5.) The initial ruling that official Press Releases are *per se* incompetent (R. 1511) appears to have been subsequently abandoned by the court (R. 1532), but in any event is plainly unsound.

The publication of official Press Releases, including those offered in evidence, was expressly authorized by the TVA directors and constitutes the official action of the TVA. (Comp. Ex. 113†, pp. 22-4, R. 2681-3; Comp. Ex. 704, R. 3631; Comp. Ex. 364, excluded, pp. 2022-3, R. 3103-4.) The dissemination of information through the issuance of Press Releases over a period of more than four years from the date of the organization of TVA comes squarely within the holding of this Court in *Xenia Bank v. Stewart,* 114 U. S.

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[1] All the Press Releases offered had been authenticated by stipulation of the parties and no question of their authenticity is involved. (R. 317.)

224, 229. Cf. *Columbia-Knickerbocker Trust Co. v. Abbot*, 247 Fed. 833, cert. den. 248 U. S. 558. There should be no question whatever as to the competency of these official Press Releases (authorized and published by TVA itself) as admissions against interest. *Chicago v. Greer*, 9 Wall. 726, 733; *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 349, 351; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 250; *Pan American P. & T. Co. v. United States*, 273 U. S. 456, 499.

The trial court sought to justify its exclusion of this type of evidence in part by the statement in the *Ashwander* case (at p. 324) that "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." The important factors overlooked by the trial court were (1) that this evidence was not offered to show the "motives and desires" of the appellees, but to show what appellees had done, were doing and were threatening to do and the nature, scope and imminence of the irreparable damage with which appellants are confronted, and (2) that the scope of the issues in the *Ashwander* case was expressly limited to the validity of the contract of January 4, 1934, and to the constitutional authority for the construction of Wilson Dam and for the disposition, as provided in the contract, of the electric energy there generated. The distinction between the present case and the *Ashwander* case is well pointed out in the opinion of the Circuit Court of Appeals in this case. (R. 274-7.) To deny appellants the right to show threatened injury by proof of appellees' declarations of the things they were doing and intended to do is to deny the existence of an entire field of equity jurisdiction. In equity, "dam-

age threatened, irremediable by action at law, is equivalent to damage done." *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 256; see also *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 82.

The trial court also attempted to justify its exclusion of this evidence under *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, wherein it was held that the motives of an administrative officer are immaterial. That rule has no application here. Appellants were not interested in appellees' motives but rather were attempting to prove, by the appellees' own statements, the appellees' acts and actions that had been performed and which they were intending to perform. The propriety of such evidence was clearly recognized by this Court in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. There the case was remanded for an inquiry into the question whether the *intended acts* of the defendants in constructing an irrigation dam on the Rio Grande would substantially diminish the navigability of the river. (Loc. cit. 709, 710.) Indeed, if proof of a defendant's intended acts were incompetent, the entire jurisdiction of equity to give relief against threatened irreparable injury would disappear.

The Press Releases and other official statements and declarations also illuminate the interpretation placed on the statute by the persons charged by law with its administration. Administrative interpretations of a statute are always relevant as bearing on the proper construction of the statute (*Wisconsin v. Illinois*, 278 U. S. 367, 413), and if the true intent and meaning of a statute is in any way obscure, great weight should be given to the construction placed upon it by the officials charged with its administration. *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *United States v. Minnesota*, 270 U. S. 181, 205; *United States v. Jackson*, 280 U. S. 183, 193;

McCaughn v. Hershey Co., 283 U. S. 488, 492. A typical example of an administrative interpretation of the TVA Act, which was published in a Press Release issued January 5, 1934 (Comp. Ex. 815, R. 3732), is quoted *supra*, pp. 81, 169-170.

Finally, and perhaps most important of all, the official Press Releases and other advertising matter in general are highly relevant to prove solicitation by the TVA of the appellants' customers, its attempts to usurp the market and its unrelenting efforts, at any cost, to build up and promote its electric utility business at the expense of appellants and other utilities. On this issue the very fact of publicity being given the documents was as important as what they said. The very essence of this sort of advertising is the advertisement itself and the refusal to receive the documents in evidence denied to appellants the right to prove a phase of TVA's activities from which they were suffering extensive injury. In the light of the ruling of the trial court excluding all TVA publicity of a purely advertising character and even in the light of the record as it stands, the trial court's finding (Fdg. 228, R. 649) that there was no solicitation by TVA is indefensible. By making a finding on the subject the trial court impliedly admitted its error in holding this evidence to be immaterial.

Furthermore, in advertising and promoting its power business by means of Press Releases and otherwise, TVA has represented that its rates cover all legitimate costs of privately owned utilities, that private ownership and operation of utilities are corrupt, and that the state-regulated rates of appellants and other utilities are unreasonable and exorbitant. In fact the TVA rates do not cover the subsidized costs of promoting and distributing TVA power and much less the costs necessarily incurred by privately owned utilities. It is scarcely necessary to say that there is nothing in the TVA Act purporting to authorize any such

course of action. It falls clearly within the accepted definition of unfair methods of competition. Selling a product below cost while misrepresenting to the public the reasons for the cheap price has been held to be unfair competition. *Sears-Roebuck & Co. v. Federal Trade Commission,* 258 Fed. 307. Again, the publication of untrue statements about the business of another, which are intended or are reasonably likely to produce and in the ordinary course of things do produce a general loss of business, is an actionable wrong. *Ratcliff v. Evans,* [1892] 2 Q. B. 524 (Court of Appeals); *Mississippi Power Co. v. Starkville,* 4 F. Supp. 833. The conclusion is inescapable, there being nothing in the Act which even faintly suggests the contrary, that Congress did not intend to authorize methods of competition which if adopted by a private citizen would be condemned as unfair and unlawful. In addition, the attacks upon the businesses and integrity of appellants, quite apart from being unfair competition and a part of a campaign of misrepresentation and oppression and hence an independent violation of appellants' rights, bear upon the imminence of the threat to appellants and upon the fact that appellees are actually engaged in promoting the establishment of a great federal power business.

The court also ruled that statement of appellees made before Committees of the Congress and in the First TVA Annual Report (Comp. Exs. 108†, 109†, 112-16†, 365†, 366†), and offered as admissions of appellees to show that the primary purpose of appellees was the creation of a vast power supply and the construction and operation of a huge electric utility, the acquisition of appellants' markets for TVA power, the fostering of public ownership of electric distribution facilities and the "yardstick" regulation of electric rates, were not admissible without offering the entire testimony or the entire report, including self-serving

statements and declarations dealing with matters not related to or explanatory of such admissions. (R. 893-4, 910-27, 1236-43, 1530-1.)[1]

1. The trial court erred in excluding competent evidence bearing upon the question whether the water power being created or to be created by TVA is being, and will be, constitutionally created. (See Point I, supra.)

Many of the official TVA Press Releases, the exclusion of which has been already discussed at pp. 219-225, *supra*, were relevant and material upon this issue. The trial court also excluded other competent evidence material to this issue.

The court refused to receive the testimony of a number of qualified witnesses whose testimony was offered to show that the average annual value of agricultural crops on lands which will be permanently flooded by only four of the reservoirs constructed, under construction or proposed to be constructed (and these not the largest of such reservoirs) would be substantially in excess of the total estimated annual flood damages in the entire Tennessee

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[1] It is clear that extracts from documents may properly be offered and received in evidence. *Davis v. Forrest*, 7 Fed. Cas. No. 3634; *Priest v. Glenn*, 51 Fed. 400; *O'Hara v. M. & O. R. Co.*, 76 Fed. 718; *Crotty v. Chicago G. W. Ry. Co.*, 169 Fed. 593; *Bernhardt v. City & S. Ry. Co.*, 263 Fed. 1009. And, although it is generally recognized that the opposing party may read such additional portions of the document as may be explanatory of the portions offered, there is no rule which makes the explanatory portions affirmative evidence or which authorizes the opposing party to use everything else in the document, however irrelevant to the issue on trial or however it may violate other well-established principles of the law of evidence. *Tappen v. Beardsley*, 10 Wall. 427, 435. The most fundamental of these other well-established principles of the law of evidence is that which rigidly excludes self-serving declarations. *Pennock v. Dialogue*, 19 Fed. Cas. No. 10,941, at p. 174; *American T. & S. Bank v. Zeigler Coal Co.*, 165 Fed. 34.

Valley.[1] (R. 1244-50.) The testimony, as was clearly stated to the trial court, was plainly relevant to show that flood control is a minor purpose of the TVA Act and of the TVA Unified Plan, if not merely pretensive, in that the annual loss resulting from the permanent flooding of valuable farm lands alone by the TVA Unified Plan will greatly exceed the average annual flood damages in the entire Tennessee Basin. (See pp. 47-48, 126-127, *supra*.)

TVA had employed the Bureau of Reclamation to prepare plans for the construction of Norris Dam. (Comp. Ex. 113°, pp. 2, 7.) It appeared in evidence that a report, entitled "The Economic Height of Norris Dam," had been made to TVA by an officer in the Bureau of Reclamation, and further, that this report pointed out that a bona fide flood control dam with more than two and one-half times the genuine flood control storage of Norris Dam could have been built at the site of Norris Dam for approximately $7,150,000, or one-fifth the cost of Norris. (R. 1816.) Upon the request of the appellants and the order of the court, the appellees produced this report and turned it over to the court. The court, however, refused the appellants the opportunity either of examining the report or using it in cross examination of the appellees' witnesses, and further returned the report to the possession of the appellees and would not permit it to be filed as an exhibit for identification to show the prejudicial character of its ruling. (R. 1816-7, 2020-1, 2197, 2286.)

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[1] This testimony was excluded by the trial court as irrelevant and immaterial and on the curious ground that it would make the proof "multifarious." (R. 1246.) Laying to one side the fact that multifariousness is a rule of equity pleading and not a ground for the exclusion of evidence (*Nelson v. Hill*, 5 How. 127, 132) and is to be determined solely from the allegations of the Bill (*Kilgore v. Norman*, 119 Fed. 1006; *Paridy v. Tractor Co.*, 48 F. (2d) 166; *Bogert v. Southern P. Co.*, 211 Fed. 776), the court did not suggest, and we have been unable to conceive of any legal or factual basis for the suggestion of multifariousness.

2. The trial court erred in excluding competent evidence bearing on the issue whether the statutory and administrative method of disposing of the electricity is within the constitutional power of the Federal Government or violates the Fifth, Ninth and Tenth Amendments. (See Point II, supra.)

a. Evidence supporting the charge that the execution of the TVA Unified Plan will establish the United States in the electric utility business with a virtual monopoly throughout the State of Tennessee and large parts of eight neighboring States.

In order to present the full picture of the vast TVA power system and business, the appellants offered testimony and documentary evidence of the extent of the existing market in the State of Georgia, the fact that such market was then being adequately served, and that all of the municipal and industrial customers proposed to be served by TVA power had been for many years customers of the Georgia Power Company, a non-complainant company. (R. 995-1003, 1098-1101, 1104, 1120-1.) The trial court's ruling excluding such testimony and documentary evidence (which included Comp. Exs. 329*, 330*, 332*, 333†, and 335†) was made on a blanket objection by appellees to the receipt of any evidence of the TVA electric business in the State of Georgia or of the markets in that State served by the Georgia Power Company, for the stated reason that the Georgia Power Company had been enjoined by a Federal District Court of Georgia from further participating in this suit. (See footnote p. 4, *supra.*) It is obvious that such injunction against the Georgia Power Company was not intended to be, and could not lawfully have been, a limitation upon the scope of the evidence submitted in another court by other parties complainant, one of which also does business in Georgia. (R. 995-1003.) No question of competency was involved in either the objection to, or the ruling upon, this evidence other than as to the effect of

the aforesaid injunction, and the exclusion of the evidence was prejudicial error.

The size, nature and effect of the entire unitary scheme of TVA for the construction, development and operation of a huge integrated electric utility may be shown by proving the size, nature and effect of the parts and adding them together. The constitutionality of this unitary scheme and the scope of the injunction to which appellants are entitled may well depend upon its size, nature and effect when viewed as a whole. The importance of these considerations in relation to the effect of the unitary scheme on the reserved powers of the States and the people, the retained rights of the people and our dual system of government is manifest. This principle was recognized in the *Ashwander* case, where the issue before this Court was, under the facts, confined to the validity of the "limited undertaking" expressed in a single contract. (See pp. 140-144, 154-159, 187-190, *supra.*)

b. Evidence supporting the charge that the appellees have adopted and are carrying out a concerted program to take over the markets and businesses of the appellants by direct inducements offered to consumers of electricity throughout the territory served by appellants.

In addition to the excluded Press Releases, hereinbefore discussed, the appellants offered and the trial court excluded a variety of other evidence which plainly supports the charge that TVA has offered direct inducements to consumers and has otherwise carried on a concerted program to take over the markets and businesses of appellants. The excluded evidence bearing upon this issue includes: (1) *TVA corporate minutes* included in the record of the *Ashwander* case which was attached as Exhibit K to appellees' answer (Comp. Exs. 700, 702-720, R. 3628, 3630-3656) relating to things TVA had done, was doing and was

planning to do in the development and conduct of its electric operations and business (R. 1531-2); (2) statements of and admissions made by appellee Lilienthal appearing in his official capacity as a representative of TVA before the House Committee on Interstate and Foreign Commerce (Comp. Ex. 364, pp. 1981-2, 2022-3, R. 3099-3104), relating to the promotional and advertising activities of TVA (R. 1236-9); (3) the testimony of a number of qualified witnesses as to statements made at public meetings by TVA representatives which showed the activities of TVA in promoting its power business in areas served by appellants and related statements of, and admissions by, TVA representatives respecting the same subjects (R. 1087-8, 1129-30, 1321-2, 1325-8, 1330, 1396-7, 1441-2); (4) a memorandum (Comp. Ex. 339, R. 3073) used by a TVA representative in soliciting the business of the Yates Bleachery Company, showing the amount of annual savings under TVA rates which would be secured by substituting TVA service for service of one of the appellants (R. 1141-3); (5) testimony showing TVA's subsidies to municipal customers taking TVA service (R. 1443-7); (6) testimony (offered by deposition) showing TVA's domination, control and promotion of cooperative associations (R. 1329-30, 1337-8, 1355-62); (7) forms of "contingent power contracts" (Comp. Exs. 193, 197, 203 and 377, R. 3003, 3006A, 3016A, 3149), circularized among the people of municipalities who were about to vote on obtaining TVA service, showing the effect of TVA's campaign of advertising and solicitation (R. 951-5, 969-70, 981-3, 1323-4, 1396-7); (8) advertising publications and circulars (Comp. Exs. 187*, 189 and 190, R. 2977, 2985) widely distributed by TVA (R. 941-2, 944, 947-8); (9) a magazine article entitled "The Tennessee Valley Looks to the Future" (Comp. Ex. 635, R. 3493), and written by a man employed by TVA for the purpose (Comp. Ex. 364, pp. 1891-2, R. 3099-3100), of which 50,000

copies were purchased by TVA for circulation, publicizing TVA's power activities, rates, business and plans for extension of its power system (R. 1513-4); (10) a TVA questionnaire (Comp. Ex. 204, R. 3106B) by which TVA circularized municipalities, including those served by appellants, to secure information respecting electric service (R. 982-3); (11) testimony (R. 1434-7) and executive messages of the Governor of Tennessee (Comp. Exs. 686, 687, R. 3605-3617) showing that the TVA had prepared and sponsored special state legislation in Mississippi and Tennessee to promote public ownership of local electric facilities and to facilitate TVA power operations within those states (R. 1435-9, 1520); (12) testimony and letters received from appellants' customers (Comp. Exs. 194, 195, 200, 201, 202, 212, R. 3003, 3004, 3008-15, 3020) stating the reasons for such customers taking TVA service in place of that offered by appellants, or containing threats by municipalities to substitute TVA electricity and showing the adverse effect on the appellants' customer relations and business that resulted from the TVA power activities and its publicity campaign. (R. 950-6, 978-81, 1037-8.)

The trial court excluded all of this evidence as irrelevant and immaterial and excluded items 8 to 12 above and two of the four contracts described in item 7 above on the additional ground that the evidence was incompetent. That all of this evidence was relevant and material appears from its description. The competency of items 7 to 12 likewise appears from their description, with the possible exception of item 12 and the documents in item 7. Item 12 was plainly competent under *Lawlor v. Loewe*, 235 U. S. 522, 536, which sustains the admissibility of letters setting forth the reason given by appellants' customers for severing their connection with appellants in order to obtain power from TVA, or in threatening to sever their connections with appellants unless appellants reduced their rates to a level

equivalent to those of TVA. The appellees' advertising campaign having been made to appear, the excluded items in item 7 were plainly competent to prove the effect of that campaign. While the trial court in these instances used the stereotyped formula "incompetent, irrelevant and immaterial," we think it quite plain that in so far as the court gave any consideration to the question of competency, it really had in mind its erroneous and premature ruling in which it undertook to limit the scope of the issues upon which evidence would be received. (See pp. 216-219, *supra*.)

The trial court further refused to issue a subpoena *duces tecum* (Comp. Ex. 1, R. 2441) to require appellees to produce *TVA corporate minutes* relating to the development of its electric power business (R. 904-9); a subpoena (Comp. Ex. 497, R. 3331) to produce a telegram from TVA to the Governor of Alabama stating the terms of a proposed statute to be submitted to the Alabama legislature (R. 1437); a subpoena (Comp. Ex. 691, R. 3619) to produce surveys made by TVA of the business and customers of appellant companies (R. 1530); and subpoenas (Comp. Exs. 690-1, 693-7, R. 3618-25) to produce TVA correspondence with municipalities and with other federal agencies relating to the TVA power business, the construction of facilities and the securing of federal funds for the carrying out of the TVA Unified Plan. (R. 1528-30.)

This list of evidence excluded or denied is formidable. That it has a material bearing upon the extent of the actual and threatened invasion by TVA of the powers reserved to the States and the people, the rights retained by the people and the solicitation of appellants' markets and businesses is manifest. It plainly establishes that TVA is using every known promotional device to seize the territory of the appellants and destroy their markets. The exclusion of this evidence does not seem explicable even by the erroneous

conceptions of law which pervade the court's findings and conclusions. Thus, while TVA may not take appellants' customers by the "allurement of substantially lower prices" (Opinion R. 551) or otherwise, because TVA is engaged in this business unlawfully, the trial court could not in any event properly exclude this competent and material evidence and find that there was no proof of solicitation by TVA.

c. Evidence supporting the charge that PWA and REA have cooperated and are continuing to cooperate with TVA in financing and promoting the TVA power program and in establishing and placing in operation the purposes of the TVA Act.

That evidence tending to support the above charge bears upon material issues in this case and that the exclusion of competent evidence of this character was prejudicial error sufficiently appears from the discussion in earlier parts of this brief. (See pp. 76-79, 159-163, 166-167, *supra.*) Furthermore, there is nothing in the TVA Act that authorizes a confederation or concert of action between TVA, PWA and REA to promote the TVA power program by forcing appellants to sell their facilities at distress prices on threat of the destruction of their value through duplication by means of loans or grants of federal funds. It is not to be presumed that Congress intended to authorize such a guerilla warfare "upon legitimate creations of the States" in the absence of an express authorization. Cf. *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U. S. 350, 359. However, the Bill charges such a common design and its execution, and appellants offered evidence to sustain the charge.

The trial court excluded a substantial part of this evidence, which included correspondence between TVA and PWA, PWA reports and memoranda in regard to particular projects, and PWA Press Releases and other documents,

showing the cooperation and concert of action between TVA and PWA in promoting the TVA power business and in establishing in operation the purposes of the TVA Act. (Comp. Exs. 418, 428, 429, 446-450, 461-466, 469, 480-483, R. 1405-8; 637-647, R. 1515.) Certain of this evidence consisted of correspondence between TVA and PWA included in "Exhibit K" attached to appellees' answer (Comp. Exs. 770-773, R. 3659-62), tending to establish the cooperation between PWA and TVA to acquire the business of appellants, and also applications to and correspondence with REA, and REA Press Releases, letters and reports (Comp. Exs. 683-685, R. 3599-3604; 385), by which appellants offered to prove the cooperation between TVA and REA in the financing and promotion of rural cooperatives and non-profit membership corporations.[1] (R. 1405-8, 1515-16, 1519-20, 1530-1.) The authenticity of the excluded documentary evidence was stipulated (R. 1403, 1515) and, being offered in connection with other evidence establishing the confederation, no question of competency arises.

The trial court also overruled successive motions by appellants, both before and during the trial, for leave to take the deposition of Harold L. Ickes, Administrator of PWA, in support of these allegations (R. 343, 364, 374-5, 379, 382, 385, 764, 1531), and refused to issue its subpoena (Comp. Ex. 1, R. 2441) to TVA to produce additional documents on this point. (R. 904-9.)

The basis of the trial court's rulings as to all evidence relating to this subject is found in its preliminary ruling denying the appellants' application for a subpoena *duces*

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[1] As stated by appellee Lilienthal in the Hearings on the Second Deficiency Appropriation Bill for 1937 (Comp. Ex. 116†, p. 485, R. 2720): "We have a very cooperative arrangement with REA by which they are furnishing by far the bulk of the financing through this area."

tecum. (R. 905-6; see pp. 216-219, *supra.*) The basic error underlying the court's ruling was the assumption that no confederation of federal agencies could be unlawful and that no use of federal power by such agencies could be an unlawful abuse of power or an unauthorized exercise of power so that the appellants were not entitled to show the facts with reference to such confederation or exercise of official power for the purpose of having their legality determined. Whether such a confederation existed and its scope, purpose and legality depended upon the facts. The trial court, in its opinion, states that if this confederation had been proved, "grave questions would have been presented" (R. 551); and yet ignored the evidence that was admitted, excluded the balance of the evidence offered and denied process to the appellants for additional evidence to establish the point. (See pp. 90-91, *supra.*)

The trial court also based its ruling on presumptions of the validity of statutes and of official action, but these are rebuttable presumptions of fact and not grounds for the exclusion of evidence. *Borden Co. v. Baldwin,* 293 U. S. 194, 209, 210. Such presumptions may always be overcome by evidence, for if irrebutable, it would never be possible to prove unlawful activities by a public officer or acts in excess of his authority.

In addition, this evidence should have been received because the gift of federal funds by PWA, the making of unsecured loans by PWA and REA and the donation of CWA labor all bear upon the imminence of appellants' damages and the inevitability of the destruction of the powers of State regulation and of the right of the people to engage in the power business.

The same principles apply with equal force to the exclusion of evidence as to cooperation between the TVA and Electric Home & Farm Authority or its predecessor Electric Home & Farm Authority, Inc., a wholly dominated adjunct of TVA. (Comp. Exs. 650-682, R. 1516-8.)

d. Evidence supporting the charge that the appellees have contracted to sell and are now offering for sale electric power and electric service at rates far below the actual cost, and that the inevitable effect of the operation of the TVA Unified Plan will be to regulate the rates of appellants.

Whether TVA is selling electricity below cost and whether the effect of the TVA Unified Plan is to regulate the rates of the appellants are plainly questions of fact. That these questions of fact are relevant appears from the discussion in earlier parts of this brief. (See pp. 79-80, 163-175, *supra.*) No question as to the competency of the testimony or documentary evidence offered on either of these issues is raised or exists. The evidence offered in support of the charge that TVA has contracted to sell electricity for less than cost includes the testimony of Professor Moreland (R. 1463-70), and Complainants' Exhibits 504-506 (R. 3343-6) which were offered to prove that the rates prescribed by TVA, when applied "to the normal capacity of the Authority's power facilities," will result in an annual operating deficit of $9,000,000 over and above the public losses arising out of the statutory subsidies. The court also refused to issue a subpoena *duces tecum* (Comp. Ex. 1, R. 2441) for documents showing the cost factors considered by TVA in fixing its rates. (R. 906.)

The evidence of sales below cost, material as bearing upon the subject of damage to appellants and upon appellees' intent to establish the statutory purpose to regulate electric rates, promote public ownership and take over control of the electric power business, is also material as showing a violation of the TVA Act in contravention of Section 14 thereof, which provides:

> "* * * It is hereby declared to be the policy of this Act that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating,

the surplus power shall be sold at rates which, in the opinion of the Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power * * *."

The court also excluded testimony of the witnesses Lefferson, Newton and Stanley (R. 1412-16, 1419-22, 949-50) and documentary evidence (R. 948-9, 972-3; Comp. Exs. 192, 198, R. 3002, 3007) showing that the inevitable effect of the operation of the TVA Unified Plan will be to regulate the local electric rates of the appellants. Manifestly, the exclusion of this testimony and documentary evidence was prejudicial error.

e. Evidence supporting the charge that the execution of the TVA Unified Plan imminently threatens each of the appellants with irreparable damage.

The trial court stated in its opinion (R. 555) that the appellants are threatened with substantial future damage. However, the trial court declined to receive any direct evidence of the nature, extent or imminence of such damage and subsequently signed Conclusions 55, 56 (R. 663), submitted by appellees, to the effect that damage had not been proved in some aspects of the TVA competition. This excluded evidence, which would have shown the necessary and inevitable effect of TVA sales below cost, includes testimony and tabulations (Comp. Exs. 512-514, R. 3354-5) as to damage to appellants from loss of revenue and from facilities being rendered idle (R. 1424, 1482-3); and testimony and exhibits (Comp. Exs. 487-496*) showing the impairment of appellants' credit by reason of the threat of TVA and their inability to borrow money or secure new capital for the purpose of financing extensions or for refunding. (R. 1264-7, 1427-34.) Much of this evidence was also material and relevant upon the extent of the inter-

ference with State regulation of rates and service. (See pp. 82-85, 144-147, *supra*.)

The court also rejected testimony showing the efforts made by some of the appellants to protect their markets and minimize their damages by absorbing the power generated by TVA. (R. 1504-7.) This testimony was also relevant upon the issue of whether the method of disposal embodied in the TVA Unified Plan is a *bona fide* exercise of the power to dispose of property and whether in any event, the disposal of the property, with maximum financial advantage to the United States and maximum dissemination of benefit to the people, requires or justifies TVA's interference with the powers of the States and the rights of the people. It, therefore, clearly appears that this evidence was material and relevant upon substantial issues in the case and that its exclusion was prejudicial error; for no question of competency is involved.

C. The trial court erred in its rulings on matters of practice and procedure during the conduct of the trial with the effect of denying appellants the opportunity to present their case fully and fairly.

1. The refusal to authorize the issuance of subpoenas duces tecum.

Before the start of the trial, appellants applied for the issuance of a subpoena *duces tecum* (Comp. Ex. 1, R. 2441) addressed to TVA requiring the production, among other things, of certain *corporate minutes of TVA* of certain specified dates in so far as they contained any reference "to the policies, activities, actions or enterprises of said Authority that involved or were related to or were in furtherance of the generation, transmission, distribution or sale of electric energy by said Authority," the production of other *TVA corporate minutes* relating to specified subjects described in the subpoena, all of which embraced

some phase of the TVA's power enterprise, and the production of certain described contracts and other described documents or classes of documents relating to subjects discussed at pp. 219-238, *supra*.

The court did not order the subpoena to issue and at the opening of the trial required appellants to submit verified statements as to the claimed materiality and relevancy of each of the documents described in the subpoena. (See Comp. Exs. 110, 111, R. 2643, 2660.) Thereafter it denied the subpoena, with a few minor exceptions, in an elaborate ruling (R. 904-9) dealing principally with ultimate questions of substantive law. (See pp. 216-219, *supra*.) In this ruling the court undertook to limit drastically the issues and the scope of the evidence *in vacuo*, without an opportunity for the appellants to show its purpose and relevancy when offered in its proper relation to the issues and other evidence as the trial progressed. Thereafter, the subpoena was broken down into separate subpoenas (Comp. Exs. 497, R. 3331; 689-697, R. 3618-25; 931, R. 3982; 954-956, R. 4002-4), and each of these was denied. (R. 1437-9, 1528-30, 2285-6, 2422-38.)

Each of the subpoenas applied for was directed to the TVA as permitted by *Wilson v. United States*, 221 U. S. 361, 372. The documents in each instance were specifically described so as to insure their identification, and although a number of documents were requested, the classes of documents described were more limited than the classes of documents described in the subpoena involved in *Brown v. United States*, 276 U. S. 134, 138, 143. The only requirement in the cases is that the documents be described "with reasonable detail" so as to indicate with sufficient clarity the particular documents desired. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 554; *Wheeler v. United States*, 226 U. S. 478, 483; *Santa Fe Pac. R. Co. v. Davidson*,

149 Fed. 603; *United States v. American Tobacco Co.*, 146 Fed. 557; *In re Storror*, 63 Fed. 564.

The original subpoena applied for (Comp. Ex. 1, R. 2441) was criticized by the trial court as to scope, but such criticism could not be made against the separate subpoenas subsequently presented. The more serious error of the court in attempting to decide fundamental questions of substantive law in ruling upon such an application persisted, however. (See pp. 216-219, *supra*.) Upon such an application the court should not undertake to determine ultimate questions of relevancy and materiality and the court need only be reasonably satisfied that such evidence, when produced, may be relevant and material in order to require its production. *Dancel v. Goodyear Shoe Mach. Co.*, 128 Fed. 753, 762; *United States v. Terminal R. Ass'n.*, 148 Fed. 486, 488, 489; 154 Fed. 268, 272. The ultimate question of admissibility should be determined by the court only with the proposed evidence before it, so that it may act intelligently, and an exception to the rejection of the evidence may be available on appeal. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 553; *Edison E. L. Co. v. United States E. L. Co.*, 44 Fed. 294, 296, 297. Here the trial court would not even order the documents produced for its own inspection so that it might intelligently pass upon their relevancy. That the evidence for which subpoena was sought, was relevant and material upon substantial issues in this case is apparent from its description and the denial of process for its production was plainly prejudicial error. There could, of course, be no question as to the competency of documents to be produced by the appellees and in any event that could not properly be decided in advance of their production and examination.

2. The refusal to limit the scope of cross examination to the subjects of direct examination and the limitation of the cross examination of appellees' witnesses by appellants in other respects.

The trial court early in the hearing (R. 848-9) ruled that it had "*deliberately and unanimously* decided to permit cross examination in this case, even upon matters not connected with the examination of any witness in chief. This right will be available on equal terms to each litigant." This ruling was more than a holding that in particular instances the trial court would exercise its discretion in determining whether cross examination was related to the examination in chief, but amounted to a declaration that the usual rules governing the examination of witnesses would not be applied in any instance whatever. The trial court adhered to this ruling over appellants' objection in the case of subsequent witnesses (R. 974-5, 1065-70) and applied it retroactively to the introduction by appellees of depositions taken by appellants of witnesses hostile to appellants. (R. 1329-34.)

The settled rule in the federal courts is that cross examination must be confined to the subjects of the direct examination; and if the cross examiner wishes to inquire as to other matters, he must make the witness his own. This rule is not discretionary except as to the scope of cross examination designed to affect the credibility of the witness or lay the foundation for his impeachment, and has been uniformly applied by this Court and in the federal courts generally. 2 *Cyc. Fed. Proc.*, 898; *Philadelphia and T. R. Co. v, Stimpson,* 14 Pet. 448, 461; *Houghton v. Jones,* 1 Wall. 702, 706; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 129 Fed. 668; 674; *Minn. & Ont. Paper Co. v. Swenson Evaporator Co.*, 281 Fed. 622, 627; *Hill v. Wabash Ry. Co.*, 1 F. (2d) 626, 630; *Union E. L. & P. Co. v. Snyder Estate Co.*, 65 F. (2d) 297, 302. It also applies

in the Sixth Circuit where this case was tried. *Hendrey v. United States,* 233 Fed. 5, 15; *American Pub. Co. v. Sloan,* 248 Fed. 251, 254.

The court's ruling seriously prejudiced the appellants by depriving them of the right to call one of the appellees, or a hostile witness, for a limited examination on specific points and in such event to have the cross examination of such witness strictly limited to the subjects upon which he had been examined in chief.[1] Under the rule announced by the trial court, appellees could have "cross examined" without limit and appellants would have been bound by any statements that such hostile witness might have made, without opportunity, in their turn, to cross examine such witness. Normally if appellees had broadened the inquiry on cross examination of a witness hostile to appellants, appellees would have made the witness their own, would have been bound by his testimony, would have been limited in the type of question by the rules governing direct examination, and appellants who originally called the witness would thereafter have had the right to cross examine him on the subjects that had been first developed by appellees.[2]

The trial court also deprived appellants of substantial rights in refusing to permit appellants the right to cross examine expert witnesses called by appellees with reference to opinions expressed by them on direct examination in conflict with opinions expressed on the same subject by

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[1] None of the individual appellees (constituting the Board of TVA) took the stand and submitted to cross examination. Their actions, programs and plans were defended only by subordinates upon the basis of assertions frequently at variance with TVA's official reports to Congress dealing with the same facts and with no proof that the TVA Board had adopted the personal suggestions or views expressed by these witnesses in this lawsuit.

[2] Cf. New Rules of Civil Procedure for District Courts of U. S., effective Sept. 16, 1938, Rule 43b.

other expert witnesses called by the appellees in this case (R. 1682), or by witnesses called by TVA in the *Ashwander* case (R. 2252), or by officers of the Corps of Engineers of the United States Army in testifying pursuant to their official duties before Committees of the Congress. (R. 1617-8.) In one instance the trial court sustained the objection upon the curious ground that the question was "personal." (R. 1682.) In another instance the court even went so far as to refuse to permit a question to appear in the record for the purpose of showing the prejudicial character of the ruling. (R. 2252.) The prejudicial effect of such a limitation upon the valuable right of cross examination for the purpose of showing the conflicting assumptions, opinions and conclusions upon vital issues of fact is patent.

3. The limitation of the scope of rebuttal.

The appellants' expert witnesses based their opinions in part upon the plans and specifications for the TVA projects and the method of their operation which had been officially reported by TVA to the Congress. During the presentation of appellees' case, various witnesses were permitted, over the objection and exception of appellants, to express personal suggestions for modifications in the design and specifications for certain structures and variations in their method of operation, which testimony was accepted by the court as showing what would ultimately be done by TVA and which was designed to place a somewhat greater emphasis upon the incidental navigation facilities and minor flood control structures than appeared from official TVA reports respecting the same subjects. These variations were, of course, in conflict with the official reports to the Congress and there was no showing that these variations, put forth in the midst of a prolonged litigation, had ever been adopted or approved by the TVA Board.

Appellants then offered evidence to rebut these conclusions (all of which were matters of opinion) and to show (1) that the factual hypotheses of such opinions were in error, and (2) that accepting such factual hypotheses, the conclusions were untenable in that the TVA projects would still be primarily for the production of power, any navigation features incidental and any flood control structures unrelated to the creation of firm water power. In substance, the trial court refused to permit appellants to rebut any of this testimony. In addition to this class of testimony, appellants sought to rebut certain opinion testimony given by appellees' witnesses which related solely to matters of defense, and which had been based in whole or in part upon erroneous assumptions of fact, and upon incomplete and inaccurate technical data or upon fallacious statements or applications of engineering principles, or which involved unfounded or fallacious criticisms of the opinions expressed by appellants' witnesses in chief, or insubstantial, and in some instances fanciful, claimed benefits to navigation and flood control from the TVA Unified Plan. (R. 2286-2331, 2339-60, 2363-70, 2375-6, 2378-86, 2402-13.) The trial court, however, excluded all rebuttal testimony involving any matter of opinion, even though it was limited to the same assumptions of fact and basic data upon which such appellees' witnesses' opinions were based. The trial court thereafter denied appellants' motions to strike from the record testimony of appellees' witnesses constituting new matter which the court had denied appellants the right to rebut. (R. 2350, 2359.)

Elsewhere in this brief, both in the Statement of the Case and in the Argument, we have referred to certain of the evidence that was offered by appellants' witnesses in rebuttal of such testimony of appellees' witnesses (see pp. 24, 26, 32, 33, 34, 38, 41, 50, 51, 57, 58, 109, 112, 123, 124, *supra*). The materiality and relevancy of such evidence

and the prejudicial character of the court's ruling excluding it abundantly appears. The court's ruling denied to appellants the opportunity to point out such errors and inaccuracies or show the trivial, and in some instances wholly unfounded, nature of such claims. The application of such a rule would require a plaintiff to anticipate and negative in advance every conceivable claim that might be advanced by his adversary or be left defenseless to show the fallacies or deny the claims, however unfounded, that the adversary might assert. And the practical impossibility of anticipating such claims or defenses would increase in direct ratio to their unsoundness or impracticability. Obviously, the law has never placed so high a premium on ingenuity.

The admissibility of opinion evidence on rebuttal was recognized by this Court in *Throckmorton v. Holt,* 180 U. S. 552, 564, in which a new trial was granted for failure to receive in rebuttal testimony of handwriting experts as to the genuineness of a signature to a will. The right to introduce expert evidence on rebuttal in a proper case is also recognized (*Limbeck v. Interstate Power Co.,* 69 F. (2d) 249; *Carson v. Jackson,* 281 Fed. 411) and an improper refusal of rebuttal testimony is reversible error. *Stanley v. Beckham,* 153 Fed. 152.

The court's limitation upon the scope of rebuttal evidence was particularly prejudicial to appellants, as the trial court had over objection and exception permitted TVA employees to give evidence and to identify exhibits (Def. Exs. 38-40, 42-48, 50, 52, 66, 87, 98 and 139) concerning the size, type of construction and possible methods of operation of TVA dams without showing that such matters had ever been approved or adopted by the TVA Board of Directors, and which were inconsistent with official statements of TVA to Congress (R. 1698-1704, 1707, 1709-10, 1712-20, 1722-25, 1753-6, 1782-3, 1791, 1823-4, 1841-2, 1848-9,

1949, 2174-77);[1] had permitted the introduction of documentary evidence (Def. Ex. 153†) consisting of self-serving declarations of appellees to the Congress which deprived appellants of the right to cross examine appellees on those subjects (R. 2279-80); had permitted employees of TVA to testify as expert witnesses on matters relating to navigation and flood control upon which subjects such employees had shown no qualifications by training or experience (R. 1705-6, 1708, 1761-2, 1789, 1851-2, 1892-4, 1913-22, 1965, 1971, 1973-8, 2041-4, 2047, 2049-51, 2054-6, 2058-64, 2234-5, 2237-8, 2241-7); had permitted appellees' witnesses to give opinion testimony of the comparative merits of the incidental navigation facilities embodied in the TVA Unified Plan and the Federal Navigation Project based upon an assumption that the Federal Navigation Project did not provide for overdepths beyond the nine-foot depth, which was contrary to the facts (R. 1973-6, 2025, 2029-31); and had permitted one of appellees' witnesses to give testimony by analogy[2] as to flood control and power projects by describing the construction and operation of a project in another part of the country. (R. 1674-81, 1687-9.)

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[1] The most startling example of this type of inconsistency was the testimony of the witness Bowman that the Gilbertsville Reservoir would provide 900,000 acre-feet more flood control storage than TVA Directors had reported to a Committee of the Congress two days prior to Bowman's testimony in this case. (R. 1726-31, 1735.) In this connection the trial court also excluded as immaterial TVA budget estimates (Comp. Ex. 926, R. 3974A) submitted to the Congress in December, 1937, offered to show such conflicts. (R. 2255-6, 2419-28.)

[2] This type of evidence by analogy, which raises collateral issues and tends to surprise opposing counsel, was clearly inadmissible. *Albany and R. Co. v. Lundberg*, 121 U. S. 451; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451; *Union E. L. & P. Co. v. Snyder Estate Co.*, 65 F. (2d) 297, 310; *Western Ins. Co. v. Tobin*, 32 Ohio St. 77; *Hand v. Catawba P. Co.*, 90 S. C. 267; *Lake Superior Co. v. Huttig L. & Z Co.*, 305 Mo. 130; *Sanitary Dist. v. Johnson*, 343 Ill. 11.

It is the position of the appellants that they are entitled to injunctive relief upon the record as made. But, if that were not so, it is plain that the errors of the trial court in matters of evidence and procedure reviewed in this Point would require a reversal of the decree with directions to take this competent and material evidence and make appropriate findings and conclusions based upon such evidence and the other evidence properly admitted in the record.

CONCLUSION.

Upon a fair consideration of the record and applicable law we submit that:

1. The water power being created and to be created by the main stream projects included in the TVA Unified Plan is not being and will not be constitutionally created.

2. The water power being created and to be created by the tributary projects included in the TVA Unified Plan (which tributary projects will create five-sixths of the water power which will be created by the execution of the TVA Unified Plan) is not being and will not be constitutionally created.

3. Neither the statutory nor administrative method of disposing of the water power (after its conversion into electricity) is within the constitutional power of the Federal Government and each is in contravention of the foundation principles of our dual system of government and violates the Fifth, Ninth and Tenth Amendments.

4. There is no real, substantial or *bona fide* relation between the disposal of federal property and the regulation of local electric rates and service or the establishment within the States of a federal policy of having the local electric business carried on by publicly owned or non-profit organizations.

5. Were any of the water power created or to be created by the execution of the TVA Unified Plan lawfully created or acquired (which it is not), the disposal of such property neither requires nor justifies the intrusion of federal power into a field normally and traditionally reserved to the States, and the destruction of the right of the people to engage in the electric business, all of which is involved in the method of disposal provided in the TVA Act and embodied in the TVA Unified Plan.

For all of the reasons hereinbefore set forth in this brief the decree of the District Court should be reversed and the cause remanded to said Court with directions to enter a decree for appellants permanently enjoining TVA and its Directors:

(1) From generating electricity out of any of the water power, created or to be created by the execution of the TVA Unified Plan or any enlargement or modification thereof, for sale in competition with the appellants or any of them;

(2) From transmitting, distributing, supplying or selling any of the water power (after conversion into electricity), created or to be created by the execution of the TVA Unified Plan or any enlargement or modification thereof, for consumption (other than for use by the Federal Government) in the areas in which the appellants or any of them is supplying, or offering to supply, electric service (and hence, in competition with the appellants or any of them);

(3) From constructing or financing the construction of electric generating stations (either steam or hydro), transmission lines or distribution facilities which would duplicate or compete with the facilities of appellants or any of them;

(4) From regulating the retail rates of the appellants or any of them through contracts or any other scheme or device;

(5) From aiding or abetting in establishing, or directly establishing, within the States in the areas in which the appellants or any of them is supplying, or offering to supply, electric service, the federal statutory policies (embodied in the TVA Act) of substituting federal regulation for State regulation of local electric rates and service and of having the local electric business carried on by publicly owned or non-profit organizations; and

(6) From incorporating in any contracts for the sale of electricity produced by Wilson Dam terms fixing the retail rates or otherwise regulating the operations of purchasers thereof in any of the areas in which appellants or any of them is supplying, or offering to supply, electric service, and thereby establishing within such areas the federal statutory policies (embodied in the TVA Act) of substituting federal regulation for State regulation of local electric rates and service and of having the local electric business carried on by publicly owned or non-profit organizations.

Respectfully submitted,

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